No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

BYRON SMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

SARAH E. HARRINGTON
Assistant to the Solicitor General

BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Inmate Accident Compensation Act, 18 U.S.C. 4126(c), which this Court has found provides the "exclusive" remedy for a federal prisoner suffering a work-related injury, see *United States* v. *Demko*, 385 U.S. 149, 152, 154 (1966), bars a suit against individual government employees based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

PARTIES TO THE PROCEEDING

The petitioners are the United States, Eddie Gallegos, William E. Howell, Jr., John Parent, Teresa Hartfield, Jeffery Sinclair, and Stephanie Wheeler.

The respondent is Byron Smith.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, Eddie Gallegos, William E. Howell, Jr., John Parent, Teresa Hartfield, Jeffery Sinclair, and Stephanie Wheeler, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 561 F.3d 1090. The opinions of the district court (App., *infra*, 32a-39a, 40a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2009. A petition for rehearing was denied on June 8, 2009 (App., *infra*, 52a). On August 19, 2009, Jus-

tice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 6, 2009. On September 28, 2009, Justice Sotomayor further extended the time to and including November 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Inmate Accident Compensation Act provides, in relevant part:

> (c) The corporation [Federal Prison Industries], in accordance with the laws generally applicable to the expenditures of the several departments, agencies, and establishments of the Government, is authorized to employ the fund, and any earnings that may accrue to the corporation—
>
> * * * * *
>
> (4) in paying, under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined.

> In no event may compensation for such injuries be paid in an amount greater than that provided in chapter 81 of title 5.

18 U.S.C. 4126(c) and (c)(4).

STATEMENT

1. The Federal Bureau of Prisons (BOP) operates work programs for federal prisoners in order to reduce inmate idleness and to develop job skills and work habits that will assist the inmates after their release. 28 C.F.R. 345.10, 545.20(a). Inmates who are physically and mentally able to work are required to participate in a work program and are permitted to receive compensation for their work. 28 C.F.R. 545.20.

In 1934, Congress enacted the Inmate Accident Compensation Act (IACA), 18 U.S.C. 4126(c), to permit a workers' compensation scheme for federal prisoners just as it had, in 1916, enacted the Federal Employees' Compensation Act (FECA) (now codified at 5 U.S.C. 8101 *et seq.*) to provide a workers' compensation scheme for federal employees, see *United States* v. *Lorenzetti*, 467 U.S. 167, 176 (1984). The IACA authorizes the payment of funds, "under rules and regulations promulgated by the Attorney General," to compensate inmate workers or their dependents "for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined." 18 U.S.C. 4126(c).[1] The statute

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[1] Initially, the IACA permitted compensation only for injuries occurring in Federal Prison Industries, which is a federal corporation that was established in 1934 "to expand an industrial training and rehabilitation program for prisoners initiated by" a prior congressional act. *United States* v. *Demko*, 385 U.S. 149, 149-150 & n.1 (1966). The statute's coverage was expanded in 1961 to cover injuries occurring during

specifies that compensation for prisoners' injuries may not exceed what is provided by FECA. *Ibid.*

As this Court has recognized, when Congress creates workers' compensation schemes, it is generally motivated by "a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits." *United States* v. *Demko*, 385 U.S. 149, 151 (1966). Although the IACA serves that purpose today, at the time it was enacted, it served a more fundamental purpose for inmates injured during prison work assignments because it provided "injured federal prisoners the only chance they had to recover damages of any kind. Its enactment was 12 years prior to the 1946 Federal Tort Claims Act." *Id.* at 152.

The regulatory scheme implementing the IACA provides two types of compensation to inmates who are injured on the job. The first type of payment compensates the inmate for wages lost as a result of his injury. 28 C.F.R. 301.101(b), 301 Subpt. B. Lost wages are computed at 75% of the standard hourly rate and are available for time lost in excess of three consecutively scheduled days of absence due to the work-related injury. 28 C.F.R. 301.203. Payments generally continue until, *inter alia*, the inmate is released, is transferred to another institution, or returns to work. 28 C.F.R. 301.204(a).

The second type of payment provides compensation to an inmate after he is released if he continues to suffer a residual physical impairment as a result of the work-related injury. 28 C.F.R. 301.303(a), 301.314(a).

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any work-related assignment in prison. Act of Sept. 26, 1961, Pub. L. No. 87-317, 75 Stat. 681 (18 U.S.C. 4126); see *Demko*, 385 U.S. at 153 & n.7.

Such payments are based on the FECA payment schedule, 28 C.F.R. 301.314(b), which is the same schedule that applies to federal employees injured on the job. This Court has noted that the payments "compare[] favorably with compensation laws all over the country," and, indeed, "offer[] far more liberal payments than many of the state compensation laws." *Demko*, 385 U.S. at 152-153. Because payments for physical impairment are not made until the prisoner's release, the regulations implementing the IACA provide that claims may not be submitted until 45 days prior to the release. 28 C.F.R. 301.303(a).

The regulations implementing the IACA also offer prisoners a variety of procedural safeguards: the right to be represented by any person not confined in a correctional facility, 28 C.F.R. 301.304(a); written notice of the basis for decision, including notification of a right to appeal, 28 C.F.R. 301.305; a right to appeal to an Inmate Accident Compensation Committee, 28 C.F.R. 301.306; the right to submit additional documentation to the Committee beyond what is in the record, 28 C.F.R. 301.308; the right to a hearing in person before the Committee, 28 C.F.R. 301.309; a right to present witnesses at the hearing, 28 C.F.R. 301.310; and a right to further review of the Committee's decision by the Chief Operating Officer of Federal Prison Industries, 28 C.F.R. 301.313. In addition, awards made to prisoners under the scheme implementing the IACA are subject to judicial review in district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* *Thompson* v. *Federal Prison Indus.*, 492 F.2d 1082, 1084 & n.5 (5th Cir. 1974); *Berry* v. *Federal Prison Indus., Inc.*, 440 F. Supp. 1147, 1148-1149 (N.D. Cal. 1977).

Differences between the compensation scheme promulgated pursuant to the IACA and other workers' compensation schemes (such as the FECA) are "due in the main to the differing circumstances of prisoners and nonprisoners." *Demko*, 385 U.S. at 152. As the regulations implementing the IACA note, compensation awards under the IACA are different from awards in a non-prison context in part because "hospitalization is usually completed prior to the inmate's release from the institution and, except for a three-day waiting period, the inmate receives wages while absent from work." 28 C.F.R. 301.318. Moreover, there are "[o]ther factors [that] necessarily must be considered that do not enter into the administration of civilian workmen's compensation laws." *Ibid.* A work-related injury has economic consequences for an injured person if the injury prevents the person from working or requires out-of-pocket expenses. When that worker is a prisoner, the IACA compensates the worker for a significant portion of any lost wages while the inmate is in prison. But prisoners have no out-of-pocket expenses comparable to those of non-prisoners; while incarcerated, prisoners are provided with medical attention without charge, as well as food, clothing, and shelter. See, *e.g.*, 18 U.S.C. 4042(a)(2) (shelter); 28 C.F.R. 549.10-549.31, 549.50-549.51 (medical care), 547.20 (food).

2. Respondent filed his pro se complaint against the United States, the Attorney General of the United States, BOP, the United States Penitentiary at Leavenworth (Leavenworth), and various employees and administrators at BOP and Leavenworth, seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.

388 (1971), for alleged violations of the Eighth Amendment. App., *infra*, 2a. Respondent initially filed his suit in United States District Court in the District of Columbia; it was then transferred to the District of Kansas. *Id.* at 6a.

Respondent alleges that, while he was a federal prisoner incarcerated at Leavenworth, he was exposed to asbestos while on a work detail with an electrical crew. App., *infra*, 3a-6a, 42a-43a. The complaint alleges that, at some point between April and June 2003, respondent's crew received a work order from Janet Durbin to install a light fixture in a large closet of a classroom at Leavenworth. *Id.* at 3a-4a, 42a. While respondent's crew worked in the closet, fellow inmate Carlos Gonzales asked to borrow tools from respondent in order to pull pipes off the wall in the closet. *Id.* at 4a, 42a. When respondent refused (consistent with prison policy), Gonzales requested and received tools from Durbin and began pulling insulation off the pipes. *Ibid.* As Gonzales worked, the air in the closet filled with dust, and respondent's crew had to stop working until the dust settled. *Ibid.*

The following day, the crew returned to the closet to finish installing the light fixture, again under the supervision of Durbin. App., *infra*, 4a-5a, 42a-43a. Fellow inmate Gonzales once again arrived and began pulling insulation off of pipes in the closet, causing dust to fill the air in the closet. *Ibid.* Respondent's work crew was told to stop working again until the dust settled, and Durbin directed Gonzales to leave the closet. *Ibid.* When the dust had cleared, respondent's crew again returned to the closet and finished the work with the help of petitioner Jeffrey Sinclair (a supervisor). *Id.* at 5a.

Approximately two years later, in March 2005, respondent filed a request for an administrative remedy concerning his exposure to the dust in the closet, which he alleged contained asbestos. App., *infra*, 43a. His request, and all subsequent appeals, were denied. *Id.* at 43a-44a.[2] Respondent filed this action on January 30, 2006.[3]

3. The district court granted petitioners' motion to dismiss. The court first held that respondent was barred from litigating his *Bivens* and FTCA claims because the IACA "provides the exclusive remedy" for inmate workers who are injured on the job. App., *infra*, 46a. The court held in the alternative that respondent could not prevail on his *Bivens* and FTCA claims in any case because he had failed to state a claim under either body of law.[4]

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[2] Respondent also filed an administrative claim under the FTCA, which was denied on October 3, 2005. Compl., Doc. 1-1, Exh. G.

[3] On March 27, 2006, respondent filed an amended complaint, adding a claim relating to the loss of his medical records. Although he filed a request for an administrative remedy relating to the records, he did not file a related administrative claim under the FTCA. First Amended Compl. 2-5.

[4] The court found that respondent's *Bivens* claim must fail because he did not allege that each individual petitioner was aware of a substantial risk of asbestos exposure; because he did not allege that Durbin, the Attorney General, petitioner Gallegos, and petitioner Lappin were involved in the possible exposure; and because the court lacked personal jurisdiction over Lappin. App., *infra*, 48a-50a. With respect to respondent's FTCA claim, the court found that he had failed to plead a "significant physical injury" permitting him to seek damages for a mental or emotional injury under the FTCA, *id.* at 46a-47a, and that he could not pursue a claim related to lost medical records because prisoners lack a protected property interest in prison property, *id.* at 47a-48a.

Three months later, respondent filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure challenging certain statements in the court's opinion. The court denied the motion, holding that the plaintiff failed to specify exceptional circumstances for relief under Rule 60(b)(6). App., *infra*, 37a-39a. Respondent then filed a motion under Federal Rule of Civil Procedure 59(e). The court also denied that motion, stating that the "allegedly 'new' evidence" respondent sought to rely on was not material, and that "the court properly construed the Rule 60(b) motion as one for relief under Rule 60(b)(6)." App., *infra*, 34a.

4. Respondent appealed both the order granting the motion to dismiss and the order denying his Rule 59(e) motion. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-29a. The court first affirmed dismissal of the FTCA claim as to all petitioners and the *Bivens* claim as to the Attorney General and Director of BOP. *Id.* at 14a-16a, 29a. But it reversed the dismissal of the *Bivens* claim as to all other defendants. *Id.* at 16a-29a.

The court of appeals held that the IACA does not preclude a *Bivens* remedy against an individual prison official who allegedly violates the Eighth Amendment in the context of an inmate work assignment. App., *infra*, 16a-24a. The court adopted the reasoning of the Seventh Circuit in *Bagola* v. *Kindt*, 131 F.3d 632 (1997), which had held that the availability of the IACA's remedial scheme for work-related prison injuries does not preclude a separate *Bivens* action, based on the same facts, against individuals who allegedly violated the Constitution. App., *infra*, 21a-24a.

Both the court of appeals in this case and the Seventh Circuit in *Bagola* relied on this Court's analysis in

Carlson v. *Green*, 446 U.S. 14 (1980), that courts should not infer a *Bivens* remedy when Congress has provided an alternative remedy that it "explicitly declared to be a *substitute* for recovery" or when "special factors counsel[] hesitation in the absence of affirmative action by Congress." App., *infra*, 18a-19a (quoting *Carlson*, 446 U.S. at 18-19). Both courts held that the IACA "contains no explicit congressional statement that a *Bivens* remedy should not be available to federal prisoners compensated under the statutory scheme." *Id.* at 22a (quoting *Bagola*, 131 F.3d at 639). The court of appeals here also adopted the *Bagola* court's "special factors" analysis, which concluded that a *Bivens* remedy should not be precluded in this context because the IACA does not sufficiently deter unconstitutional behavior by individuals and does not provide plaintiffs with a forum for bringing to light unconstitutional behavior. *Id.* at 22a-23a (relying on *Bagola*, 131 F.3d at 642-645). Those factors, the courts held, distinguished this context from those at issue in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), in which this Court declined to create a *Bivens* remedy.

The court of appeals below rejected petitioners' argument that the court should consider whether to recognize a new *Bivens* remedy in this case by using the analysis this Court recently set out in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007); the court adopted instead the pre-*Wilkie Bagola* court's analysis of "special factors." App., *infra*, 22a-23a. The court below also stated, in any event, that no analysis of whether to recognize a new *Bivens* remedy was necessary because this Court in *Carlson* had already recognized a *Bivens* remedy for "an Eighth Amendment violation by prison officials." *Id.* at 20a n.11 (citation omitted).

The court of appeals also held that the complaint and amended complaint had adequately pleaded the defendants' awareness of asbestos, and that the plaintiff's Eighth Amendment claim was therefore plausible under *Bell Atlantic Co.* v. *Twombly*, 550 U.S. 544 (2007). App., *infra*, 24a-29a. The court remanded the case for further proceedings. *Id.* at 29a-31a.

5. The court of appeals denied petitioners' petition for rehearing en banc on June 8, 2009. App., *infra*, 52a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that the remedial scheme implementing the IACA, 18 U.S.C. 4126(c), does not preclude a court from creating a *Bivens* remedy for Eighth Amendment deliberate indifference claims by an inmate who is injured during a prison work assignment. The court's decision and reasoning are inconsistent with this Court's decisions and reasoning in *Bush* v. *Lucas*, 462 U.S. 367 (1983), *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), and *Wilkie* v. *Robbins*, 551 U.S. 537 (2007).

On September 30, 2009, this court granted a petition for a writ of certiorari in *Hui* v. *Castaneda*, No. 08-1529 (*Castaneda*).[5] That case present the question whether 42 U.S.C. 233(a) bars a *Bivens* action against a commissioned officer or employee of the Public Health Service by providing that a suit against the United States under the FTCA is exclusive of any other action against such

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[5] On September, 30, 2009, this Court granted petitions for writs of certiorari in two cases arising out of the Ninth Circuit's decision in *Castaneda* v. *United States*, 546 F.3d 682 (2008). See *Hui* v. *Castaneda*, No. 08-1529; *Henneford* v. *Castaneda*, No. 08-1547. On October 29, 2009, the Court dismissed the writ of certiorari in *Henneford* v. *Castaneda*, No. 08-1547.

an officer or employee for injury resulting from the performance of medical functions. This case presents a similar question in the context of another federal statute, the IACA, which this Court has held is the "exclusive" remedy for a federal prisoner suffering a work-related injury. See *United States* v. *Demko*, 385 U.S. 149, 152, 154 (1966).[6] This Court's resolution of the question presented in *Castaneda* is likely to supply the appropriate analysis for this case as well. Thus, the Court should hold this petition pending the Court's decision in *Castaneda*, and then dispose of it accordingly.

This Court recently held in *Wilkie* that a court's consideration of "whether to recognize a *Bivens* remedy may require two steps." 551 U.S. at 550. First, a court must determine "whether any alternative, existing process for protecting the interest [at stake] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* Second, in the absence of such an alternative remedy, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Ibid.* (quoting *Bush*, 462 U.S. at 378).

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[6] As noted above, the court here adopted the reasoning of the Seventh Circuit in *Bagola* v. *Kindt*, 131 F.3d 632 (1997). The Third and Ninth Circuits also agree with the conclusion in *Bagola*. *Cooleen* v. *Lamanna*, 248 Fed. Appx. 357, 362 n.5 (3d Cir. 2007); *Vaccaro* v. *Dobre*, 81 F.3d 854, 857 (9th Cir. 1996). The Sixth Circuit, in two unpublished decisions, has reached a different conclusion. *Springer* v. *United States*, No. 99-6276, 2000 WL 1140767, at *1 (Aug. 8, 2000); *Walls* v. *Holland*, No. 98-6506, 1999 WL 993765, at *1-*2 (Oct. 18, 1999).

The court of appeals erroneously recognized a *Bivens* remedy for inmates who are injured during prison work assignments notwithstanding the existence of the IACA. In *Demko*, this Court applied to the IACA the principle that, "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group," and concluded that the IACA is, indeed, the exclusive remedy for inmates injured on the job. 385 U.S. at 152-154. Because the Court in *Demko* considered whether the IACA was the exclusive remedy against the United States—rather than against an individual federal employee—for inmates injured on a work assignment, its holding does not strictly control the outcome of this case. But the same reasons that led the Court to conclude that the IACA precludes FTCA actions against the United States should have led the court of appeals to conclude that the IACA precludes *Bivens* actions against prison employees. Congress "created a comprehensive system to award payments for injuries" in the IACA and "[t]here is no indication of any congressional purpose to make" the compensation scheme implementing the IACA "non-exclusive." *Id.* at 151-152 (citation omitted).

Both the court of appeals in this case and the Ninth Circuit in *Castaneda* placed undue reliance on this Court's statement in *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980), that a *Bivens* claim rests on whether "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." See App., *infra*, 18a-19a; *Castaneda* v. *United States*,

546 F.3d 682, 689 (9th Cir. 2008).[7] In the decades since *Carlson* was decided, this Court has declined to recognize any additional *Bivens* causes of action.[8] Equally important and directly relevant to this case, the Court has made clear that Congress need not explicitly declare that a remedial scheme is intended to supplant a *Bivens* claim or that such a scheme is as effective as a *Bivens* claim in order to preclude the creation of a direct

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[7] These courts' reliance on the statement in *Carlson* focusing on whether Congress has explicitly stated an intent to preclude a *Bivens* action is particularly inappropriate where—as here and in *Castaneda*—the statute at issue was enacted before *Bivens* was decided. In such a situation, a court is demanding what cannot logically exist—a statement from Congress that a statute is intended to be a substitute for a remedy that had not yet been created.

[8] Since *Carlson*, this Court has consistently expressed a strong reluctance to expand the availability of *Bivens* claims. See, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'") (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001)); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (*Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified."); *Malesko*, 534 U.S. at 68-69 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. * * * So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."); *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-423 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); *Bush* v. *Lucas*, 462 U.S. 367, 374-390 (1983) (refusing to provide *Bivens*-type remedy given alternative remedial scheme created by Congress).

cause of action under the Constitution. *Bush*, 462 U.S. at 380-390; *Schweiker*, 487 U.S. at 424-429; *Wilkie*, 551 U.S. at 551-562.

In addition to relying on the absence of an explicit congressional intent to preclude a *Bivens* claim, the court below and the Ninth Circuit in *Bagola* stressed that the remedies provided in the IACA do not provide full relief for plaintiffs' alleged constitutional injuries. But here too, this Court has explicitly rejected this approach: it has held that Congress need not provide a remedy that provides complete relief for an alleged constitutional violation, that is as effective as a *Bivens* claim, or that permits suit against individual defendants at all. *E.g.*, *Schweiker*, 487 U.S. at 425-427 (holding that "statutory violations caused by unconstitutional conduct" do not "require remedies in addition to the remedies provided generally for such statutory violations" even where existing statutory remedies fail to provide "complete relief" for constitutional harm); *Bush*, 462 U.S. at 378 (refusing to recognize a *Bivens* remedy even though the petitioner did not have "an equally effective substitute"); *id.* at 388 (stating that the question whether a *Bivens* action should be available "obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff"); see U.S. Amicus Br. at 19, *Castaneda*, *supra* (No. 08-1529) ("Thus, as the D.C. Circuit has noted, 'subsequent to *Carlson*, the Court clarified that there does not need to be an equally effective alternative remedy, in order to bar the fashioning of a cause of action under *Bivens*.'") (quoting *Wilson* v. *Libby*, 535 F.3d 697, 708 (2008), cert. denied, 129 S. Ct. 2825 (2009)).

This Court's disposition of *Castaneda* will likely illuminate the circumstances in which an existing statutory

remedy precludes recognition of a *Bivens* remedy when Congress has not explicitly stated its preclusive intent and when the statutory remedy is not as effective as a *Bivens* remedy would be.

CONCLUSION

The petition should be held pending the Court's decision in *Hui* v. *Castaneda*, No. 08-1529, and then disposed of accordingly.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
BARBARA L. HERWIG
EDWARD HIMMELFARB
Attorneys

NOVEMBER 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 07-3242 & 08-3109
(D.C. No. 06-CV-3061-JTM)

BYRON SMITH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; ERIC HOLDER, UNITED STATES ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY; ALBERTO GONZALES, FORMER UNITED STATES ATTORNEY GENERAL, IN HIS INDIVIDUAL CAPACITY; FEDERAL BUREAU OF PRISONS; UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS; AND H. LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS; EDDIE GALLEGOS, ACTING WARDEN; WILLIAM E. HOWELL, JR., SAFETY MANAGER, FEDERAL BUREAU OF PRISONS; JOHN PARENT, CUSTODIAL MAINTENANCE SERVICES MANAGER, FEDERAL BUREAU OF PRISONS; TERESA HARTFIELD, EDUCATION ADMINISTRATOR/PRINCIPLE, FEDERAL BUREAU OF PRISONS; JEFFERY SINCLAIR, ELECTRIC SHOP SUPERVISOR, FEDERAL BUREAU OF PRISONS; JOHN DOE, EDUCATION STAFF MEMBER, FEDERAL BUREAU OF PRISONS; JANET DURBIN, EDUCATION STAFF MEMBER, FEDERAL BUREAU OF PRISONS; STEPHANIE WHEELER, SAFETY OFFICER, FEDERAL BUREAU OF PRISONS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, DEFENDANTS-APPELLEES

[Filed: Mar. 31, 2009]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Before: BRISCOE, HOLLOWAY, and MURPHY, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff-Appellant Byron Smith brings claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against Defendants-Appellees. Defendants-Appellees are the United States, the Attorney General of the United States,[2] the Federal Bureau of Prisons, the United States Penitentiary at Leavenworth ("Leavenworth"), and various employees and administrators at the Bureau of Prisons and Leavenworth (hereinafter collectively referred to as "defendants"). Defendants filed a motion to dismiss Smith's claims, which was granted by the district court, and Smith appeals that decision.

We have jurisdiction over this matter pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part,

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[2] Because it is unclear whether the Attorney General of the United States is sued in his official or individual capacity, we construe Smith's complaint liberally to assert both an official-capacity and individual-capacity claim against the Attorney General of the United States. *See Reynoldson v. Shillinger*, 907 F.2d 124, 125 (10th Cir. 1990) (applying the principle that "pro se prisoner complaints must be construed liberally").

and remand for further proceedings. Regarding Smith's FTCA claim, we affirm the district court because: first, an FTCA claim can only be brought against the United States; and, second, the Supreme Court has expressly held that an FTCA claim is precluded when the Inmate Accident Compensation Act applies, as it does here.

Regarding Smith's *Bivens* claim against all defendants other than the individual federal officials in their individual capacities, we affirm the district court's dismissal because *Bivens* claims cannot be asserted directly against either the United States or federal officials in their official capacities or against federal agencies.

Regarding Smith's remaining *Bivens* claim against individual federal officials in their individual capacities, we reverse the district court in part and affirm in part because: first, the district court erred by finding that the Inmate Accident Compensation Act was the exclusive remedy precluding Smith's *Bivens* suit; and, second, the district court erred by finding that Smith's complaint failed to make allegations sufficient to state a claim for relief against the individually named federal officials in their individual capacities other than Alberto Gonzales and H. Lappin.

I

A. Smith's Allegations

Smith's complaint stems from allegations that he was exposed to asbestos in 2003 while an inmate at Leavenworth. During his incarceration in Leavenworth, Smith worked as an electrician for the prison's Custodial Maintenance Services. Smith received a work order from his supervisor, defendant Jeffery Sinclair, to install a new light fixture in a closet in the prison's education depart-

ment. Smith and others who were assigned to perform the installation were given access to the locked closet by defendant Janet Durbin, a staff member in the education department.[3] The closet lacked any ventilation.

While Smith was installing the light fixture, a fellow inmate, Carlos Gonzalez, entered the closet and asked to borrow some tools from Smith. Smith refused, consistent with prison policy, and Gonzalez then requested tools from Durbin, who provided them to Gonzalez. Gonzalez, who had been instructed by prison staff to clean the closet, then began pulling insulation off of the pipes in the closet, thereby filling the air with dust. Smith alleges that this dust contained asbestos, and the dust irritated his eyes, nose, and throat, and caused him to begin coughing.[4] Durbin directed Gonzalez to wait until the light fixture was installed before continuing his work in the closet. The work crew suspended work until the dust settled.

The next day, Smith was given another work pass by Sinclair and he and the other members of the work crew returned to the closet to finish installing the light fixture. They were again given access to the closet by Durbin, and she again supervised their work. Gonzalez was allowed back into the closet while Smith and the others were working inside. Once inside, Gonzalez pulled insulation off pipes, releasing additional dust to which Smith was exposed. The dust again caused irritation to Smith,

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[3] Defendant Teresa Hartfield, the education administrator and Durbin's apparent supervisor, had to approve of all work or changes within the education department.

[4] Attachments to Smith's original complaint also include an allegation by Smith that he had "developed white circles" on his lungs. Aplt. App. Doc. I Exh. D1.

and the work crew again stopped working until the dust settled. Durbin directed Gonzalez to leave the closet, threatening to write a report on him if he did not comply. After the dust cleared, Smith and the crew continued work on the fixture, but could not get the light to work. Durbin called Sinclair, and he arrived to assist. The job was then completed.

In 1994, a survey was performed by the Ramsey-Schilling Consulting Group, documenting the presence of asbestos in "Building # 116" at Leavenworth and stating that the pipe insulation in the second floor education southwest storage room was damaged. Smith alleges the closet where he was exposed to dust in 2003 is in the education department of "Building # 116," and specifically alleges that this southwest storage room is where he was exposed to asbestos. Smith contends that the pipe insulation that was disturbed by Gonzalez was not in good repair, and that due to the pipe insulation's damaged condition, asbestos was exposed to the air.

Smith alleged that the "safety [department at Leavenworth], CMS [Custodial Maintenance Services at Leavenworth] and the education department knew that asbestos was in the closet" due to the Ramsey-Schilling survey. Aplt. App. Doc. 1 Attach. 4 at ¶ 27. Smith also references the response to his administrative remedy request which implies that the warden at Leavenworth also knew of the asbestos as a result of the Ramsey-Schilling survey. Smith further alleges that he was never given any warning regarding the asbestos at any point. Smith claims that he suffers from a cough, shortness of breath, and trouble with his throat and eyes. Smith also alleges emotional distress.

B. Procedural Posture

Smith filed his initial pro se complaint in the United States District Court for the District of Columbia.[5] The case was then transferred to the United States District Court for the District of Kansas due to improper venue. Smith filed an amended complaint in the District of Kansas post-transfer, which incorporated by reference the original complaint's factual allegations. Smith's amended complaint alleges that defendants[6] were negligent and deliberately indifferent by exposing him to asbestos without protective measures. Smith seeks compensatory damages, punitive damages, and injunctive relief for future medical care. *Id.* Doc. 5 (Smith's "First Amended Complaint").

The district court granted defendants' motion to dismiss Smith's amended complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and, alternatively, for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6). The district court concluded that the prisoners' workers' compensation

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[5] At the time he filed his complaint, Smith was incarcerated at the United States Penitentiary Hazelton in West Virginia.

[6] Specifically, defendants are: the United States government, the Attorney General, the Federal Bureau of Prisons, the United States Penitentiary at Leavenworth, H. Lappin (director of the Federal Bureau of Prisons), Eddie Gallegos (the former warden at Leavenworth), William Howell, Jr. (the safety department manager at Leavenworth), John Parent (the Custodial Maintenance Services manager at Leavenworth), Teresa Hartfield (the education administrator at Leavenworth), Jeffery Sinclair (the electrical shop supervisor at Leavenworth), John Doe (a member of the education staff at Leavenworth), Janet Durbin (a former member of the education staff at Leavenworth), and Stephanie Wheeler (a safety department member at Leavenworth). *See* Aplee. Br. at 5 nn.2-3; Aplt. App. Docket Sheet.

statute, the Inmate Accident Compensation Act, 18 U.S.C. § 4126, was Smith's exclusive remedy for his alleged work-related injuries, foreclosing Smith's FTCA and *Bivens* claims. Aplt. App. Doc. 59 at 6. The district court alternatively found that Smith's FTCA claim could only be brought against the United States. The district court also held that Smith's FTCA claim against the United States failed because his allegations of harm did not constitute a physical injury. *Id.* at 8. His claim for lost medical records was also dismissed because Smith did not have a protected property interest in them. *Id.* at 6-8. The district court then alternatively found that Smith's *Bivens* claim failed because the amended complaint did not allege that defendants "knew he faced a substantial risk of harm and disregarded that risk." *Id.* at 8-9 (internal quotation omitted).

Smith filed a Rule 60(b) motion in which he asked the district court to reconsider its decision. The district court denied Smith's motion. Smith then filed a Rule 59(e) motion in which he asked the district court to alter or amend the judgment. The district court also denied that motion.

We are presented with two appeals. Case number 07-3242 is an appeal from the district court's dismissal of Smith's amended complaint, and case number 08-3109 is an appeal from the district court's denial of Smith's motion to alter or amend judgment under Rule 59(e). Smith did not file a notice of appeal regarding the district court's denial of his Rule 60(b) motion, but did subsequently file an amended notice of appeal purporting to include in Case No. 08-3109 review of the denial of his

Rule 60(b) motion. Smith's two appeals were consolidated, and counsel was appointed for Smith.[7]

II

A. Smith's Pro Se Status in the District Court

At the outset, it is important to note Smith's pro se status in the district court. "[A] pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation omitted). In *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), we stated:

> We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

"This court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). We have on several occasions dismissed pro se complaints for failure to allege sufficient facts. *See Hall*, 935 F.2d at 1110 (citing cases).

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[7] Smith filed repeated motions for the appointment of counsel in the district court, Aplt. App. Docs. 6-8, 47-49, 58, all of which were denied, *id.* Docs. 13, 59.

B. Appellate Jurisdiction

We must first determine the scope of our appellate review in this case. Certainly, we have jurisdiction to review Smith's appeal of the district court's memorandum and order dismissing his amended complaint under Rule 12(b). *See* 28 U.S.C. § 1291 (granting jurisdiction to the courts of appeals over "appeals from all final decisions of the district courts"); *Moya v. Schollenbarger*, 465 F.3d 444, 450 (10th Cir. 2006) (stating that when "a district court order expressly and unambiguously dismisses a plaintiff's entire action, that order is final and appealable"). We may review all of the arguments Smith raised before the district court that pertain to that ruling. *Pierce v. Shorty Small's of Branson Inc.*, 137 F.3d 1190, 1192 (10th Cir. 1998).

Smith also timely filed a notice of appeal with respect to the district court's denial of his Rule 59(e) motion. As a result, we also have jurisdiction under 28 U.S.C. § 1291 to review the district court's denial of that Rule 59(e) motion.

However, there is some question whether we may also consider arguments raised in support of Smith's Rule 60(b) motion. Smith filed his Rule 59(e) motion based on his view that the district court had erroneously denied his Rule 60(b) motion. Aplt. App. Doc. 76. In his Rule 60(b) motion, Smith argued, for the first time, that the Inmate Accident Compensation Act does not provide him a true remedy because his benefits under that Act do not become ripe until Smith is near release from prison. *Id.* Doc. 66 at 5-7. Under the standard enunciated in Rule 60(b)(6), the district court denied Smith's Rule 60(b) motion after finding Smith had stated no

"exceptional circumstances" to support granting the motion. *Id.* Doc. 75.

Smith did not file a separate appeal from the denial of his Rule 60(b) motion. However, he did file an amended notice of appeal, after he appealed the denial of his Rule 59(e) motion, stating that he was appealing the denial of both post-judgment motions. *Id.* Doc. 92. Smith's filings clearly put defendants on notice that he was appealing the district court's rulings on both motions. We stated in *Independent Petroleum Ass'n of America v. Babbitt*, 235 F.3d 588, 593 (10th Cir. 2001), that:

> Under Rule 3(c) [of the Federal Rules of Appellate Procedure], a notice of appeal must designate the judgment, order, or part thereof being appealed. Nevertheless, a party's failure to designate the proper order it intends to appeal is not necessarily fatal. As we have explained, a party may demonstrate its intention to appeal from one order despite referring only to a different order in its petition for review if the petitioner's intent can be fairly inferred from the petition or documents filed more or less contemporaneously with it. Furthermore, without a showing of prejudice by the appellee, technical errors in the notice of appeal are considered harmless.

(internal quotations and citations omitted). As a result, we will exercise jurisdiction over Smith's appeal from the denial of both the Rule 60(b) and Rule 11 59(e)[8] mo-

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[8] An order denying a post judgment motion is reviewed for an abuse of discretion. *Jennings v. Rivers*, 394 F.3d 850, 854 (10th Cir. 2005). A district court has substantial discretion to grant Rule 60(b) relief as justice requires, and "such relief is extraordinary and may only be granted

tions and consider the arguments raised in those motions in our merits review of Smith's claims.[9]

And finally, in the district court, Smith appeared to make a claim relating to his allegedly lost medical records. *See* Aplt. App. Doc. 5 ¶¶ 3-15 (portion of amended complaint setting out the alleged loss of Smith's medical records); Doc. 59 at 7-8 (portion of district court's memorandum and order dismissing any claim under the FTCA for Smith's loss of medical records). However, neither in his opening brief nor in subsequent briefing does Smith press any issue with respect to his medical records. As a result, we conclude Smith has not appealed the dismissal of his claims regarding lost medical records. *See* Fed. R. App. P. 28(a)(9)(A) (requiring the appellant's opening brief to contain the contentions

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in exceptional circumstances." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) (internal quotations omitted). However, a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005) (internal quotation omitted). "And a Rule 59(e) motion is normally granted only to correct manifest errors of law or to present newly discovered evidence." *Jennings*, 394 F.3d at 854 (internal quotation omitted).

Because the ultimate determinations on the merits of Smith's claims are based on legal grounds and the correct application of the applicable legal standards, the standard of review is met regardless which appellate standard is used.

[9] Smith filed a "Request to Call for Affidavit" requesting the court to consider certain documents on appeal. Prior to consolidation of Smith's appeals, the government filed a response in opposition, arguing that we lacked jurisdiction over some of the matters in the appeal of the district court's memorandum and order. Because we have consolidated Smith's appeals, and have determined that we should consider the arguments made in support of both, we grant Smith's motion.

raised on appeal); *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) (concluding that issues and arguments on which an appellant desires appellate review must be raised in the appellant's opening brief or be waived).

C. *District Court's Memorandum and Order Dismissing Smith's Claims*

1. Standard of Review

A dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) is reviewed de novo. *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007). A facial attack on the complaint's allegations regarding subject matter jurisdiction questions the complaint's sufficiency and requires the court to accept the allegations as true. *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005).

The legal sufficiency of a complaint is a question of law, and a Rule 12(b)(6) dismissal is reviewed de novo. *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). Again, for purposes of resolving a Rule 12(b)(6) motion, we accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff. *Id.* "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal quotation omitted).

The Supreme Court recently retired "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). The Court replaced the *Conley* standard with a new standard in *Twombly*, which "prescribed a new inquiry for [courts] to use in reviewing a dismissal: whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1974). The Court explained that "a plaintiff must 'nudge his claims across the line from conceivable to plausible' in order to survive a motion to dismiss." *Id.* (internal citation and brackets omitted). "Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Id.*

In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits, *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 964-65 (10th Cir. 1994), and documents incorporated into the complaint by reference, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007); *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1180 (10th Cir. 2007). "[T]he district court may consider documents referred to in the complaint if the documents are central to the plaintiff's

claim and the parties do not dispute the documents' authenticity." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation omitted).

2. The Inmate Accident Compensation Act, 18 U.S.C. § 4126

The Inmate Accident Compensation Act, and the regulations promulgated thereunder, provide two types of compensation for a federal inmate who suffers a work-related injury or improper medical treatment of a work-related injury. The first type of compensation is available only when the inmate is ready to be released from prison and reenter the workforce. 28 C.F.R. §§ 301.101(a), 301.301-.319. If the inmate still suffers a residual physical impairment as a result of the work-related injury, then within forty-five days of his release date, he can submit a claim for compensation. *Id.* § 301.303(a). If, however, he has fully recovered from his injuries while incarcerated, he is not entitled to any compensation. *Id.* § 301.314(a). The second type of compensation is for wages the inmate actually loses while he is prevented from doing his work assignment due to his injury. *Id.* §§ 301.101(b), 301.201-.205.

3. FTCA Claim

The district court dismissed Smith's FTCA claim on two bases: first, that the FTCA claim is barred because "the cause of his alleged injuries [is] work-related and compensable only under 18 U.S.C. § 4126," Aplt. App. Doc. 59 at 6; and second, that an FTCA claim, which may only be brought against the United States, failed for lack of an alleged "significant physical injury," *id.* at 6-7.

As an initial matter, we, like the district court, note that Smith asserted his FTCA claim against all the named defendants. "The United States is the only proper defendant in an FTCA action." *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 n.4 (10th Cir. 2001). Thus, the district court correctly dismissed Smith's FTCA claims against every defendant except the United States on the ground that those defendants were not proper parties.

We also note that the Supreme Court has long recognized the right of federal prisoners to recover damages against the United States under the FTCA for personal injuries sustained as the result of the negligence of a federal employee. *See United States v. Muniz*, 374 U.S. 150, 150 (1963) (holding that a person can sue under the FTCA "for personal injuries sustained during confinement in a federal prison, by reason of the negligence of a government employee"). But when a federal prisoner's injuries are work-related, the Supreme Court has held that the prisoner's exclusive remedy against the government is the Inmate Accident Compensation Act; he cannot sue the government under the FTCA. *United States v. Demko*, 385 U.S. 149, 152-54 (1966). There is no dispute that Smith's alleged injuries are work-related.

Smith argues that the Inmate Accident Compensation Act should not be the exclusive remedy against the government for a prisoner like himself who has a very long sentence. He argues the Inmate Accident Compensation Act likely would afford him little, if any, relief because he might die before he is within forty-five days of his release date, which is when he could first apply for benefits under the Act. The Supreme Court in *Demko* considered the argument that the Inmate Accident Com-

pensation Act is not comprehensive enough, and rejected it. *Id.* at 152. "Until Congress decides differently we accept the prison compensation law as an adequate substitute for a system of recovery by common-law torts." *Id.* at 153. Accordingly, the district court properly dismissed Smith's FTCA claim against the United States for any injuries incurred while working at Leavenworth.

4. *Bivens* Claim

As with the FTCA claim, Smith's *Bivens* claim was asserted against all defendants. However, a *Bivens* claim can be brought only against federal officials in their individual capacities. *Bivens* claims cannot be asserted directly against the United States, federal officials in their official capacities, *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001), or federal agencies, *F.D.I.C. v. Meyer*, 510 U.S. 471, 485-86 (1994). As a result, the district court correctly dismissed Smith's *Bivens* claims against all defendants except for his claims against the individual federal officials in their individual capacities.

Regarding the remaining *Bivens* defendants, however, the Supreme Court has held that a *Bivens* remedy *may* be available against federal prison officials for violations of the Eighth Amendment. *See Carlson v. Green*, 446 U.S. 14, 18 (1980) (stating that "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court" in a case involving allegations of personal injuries from federal prison officials). Nonetheless, the individual defendants here argued that no *Bivens* remedy was available because the Inmate Acci-

dent Compensation Act constituted Smith's exclusive remedy for any injury resulting from his alleged asbestos exposure.[10] As support for this argument, defendants cited the Supreme Court's decision in *Demko*, 385 U.S. 149, our published decision in *United States v. Gomez*, 378 F.2d 938 (10th Cir. 1967) (per curiam), and our unpublished decision in *Alvarez v. Gonzales*, 155 F. App'x 393 (10th Cir. 2005). The district court, in turn, relied on these three cases in granting defendants' motion.

Neither *Demko* nor *Gomez* concerned a claim against individual federal officials, however. Rather, *Demko* addressed whether the Inmate Accident Compensation Act's administrative compensation scheme provided a federal prisoner's exclusive remedy against the United States for a work-related injury and thus barred suit against the government under the FTCA. *Demko*, 385 U.S. at 150. In ruling that the Inmate Accident Compensation Act did preempt a claim under the FTCA, the Court noted that workers' compensation statutes were historically "the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits [and there-

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[10] Defendants contended that whether a *Bivens* remedy was available to Smith was a matter of subject matter jurisdiction, and the district court apparently agreed. As we have previously stated, however, whether a court should imply a *Bivens* remedy is not a question of subject matter jurisdiction. *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1096 (10th Cir. 2005), vacated in part on other grounds on reh'g en banc, 449 F.3d 1097 (10th Cir. 2006). "In fact, there is no power to imply a *Bivens* cause of action unless a court has *first* satisfied itself that jurisdiction exists." *Id.* Thus, the district court had jurisdiction pursuant to 28 U.S.C. § 1331 to consider Smith's Eighth Amendment claims.

fore] compensation laws are practically always thought of as substitutes for, not supplements to, common law tort actions." *Id.* at 151. In contrast, the Court held in *Carlson* that it is "crystal clear that Congress views the FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20.

This court's two-paragraph per curiam decision in *Gomez* followed on the heels of *Demko* and set aside a judgment against the United States under the FTCA for a prisoner's work-related injuries. *Gomez*, 378 F.2d at 939. While *Gomez* did describe *Demko* as holding that "the compensation benefits provided by 18 U.S.C. § 4126 constitute the exclusive remedy for injuries received by federal prisoners while performing assigned prison tasks," *id.*, we must be careful not to take this statement out of context. Both *Demko* and *Gomez* concerned only tort claims against the United States, and neither purported to consider whether the Inmate Accident Compensation Act also constituted an inmate's exclusive remedy for claims against an individual federal official who has allegedly violated the inmate's constitutional rights in connection with a work-related injury.

The Supreme Court in *Carlson*, in holding that the FTCA did not preclude the prisoner's *Bivens* claim, stated that a plaintiff's ability to pursue a *Bivens* claim is precluded in two specific instances:

> The first is when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress. The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a

> *substitute* for recovery directly under the Constitution and viewed as equally effective.

446 U.S. 18-19 (internal quotation and citations omitted). The *Carlson* Court supported its conclusion that Congress did not intend the FTCA to preclude a prisoner's *Bivens* claim by finding that a *Bivens* remedy was more effective than the FTCA remedy. *Id.* at 20-23. The *Carlson* Court noted the deterrent effect of the *Bivens* remedy because of the potential personal financial liability to federal officials, in addition to federal officials' potential exposure to the imposition of punitive damages. The Court also noted the availability of a jury trial under *Bivens*. *Id.* None of these rights or remedies are available under the FTCA.

In *Bivens* cases following *Carlson*, the Supreme Court has provided further explanation of the "special factors counselling hesitation in the absence of affirmative action by Congress" which limit judicial expansion of the *Bivens* remedy. The Supreme Court stated in *Bush v. Lucas*, 462 U.S. 367, 378 (1983), that "[w]hen Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised." And in *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988), the Court noted that

> the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what

it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Despite the presence of *Demko*, *Carlson*, *Bush*, and *Schweiker*, this court has not yet considered whether the language of the Inmate Accident Compensation Act or its clear legislative history signal Congress' intent to preclude federal courts from recognizing a *Bivens* cause of action that arises out of a work-related injury.[11] We have not considered whether the design of the Inmate Accident Compensation Act provides what Congress would consider adequate remedial mechanisms for constitutional violations, nor whether any other special factors counsel hesitation in recognizing a *Bivens* cause of action in these circumstances.[12]

Although we did conclude in *Alvarez* (an unpublished order, *see Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003) ("[U]npublished decisions are

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[11] Defendants argue that we are creating a new *Bivens* remedy for deliberate indifference under the Eighth Amendment, citing *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007). We disagree. In *Wilkie*, the Supreme Court discussed the two-step process for determining whether to recognize a *Bivens* remedy (citing *Bush*), and ultimately declined to permit the *Bivens* remedy for a Fifth Amendment retaliation claim against land ownership interests that had been brought against Bureau of Land Management officials. 127 S. Ct. at 2598-2604. The Court noted in *Wilkie*, however, that it had previously recognized a *Bivens* claim for "an Eighth Amendment violation by prison officials" in *Carlson*. *Id.* at 2597.

[12] The Inmate Accident Compensation Act was amended in 1988, Pub. L. No. 100-690, 102 Stat. 4412, and 2004, Pub. L. No. 108-271, 118 Stat. 814, post-*Bivens* and post-*Carlson*, without any Congressional comment on the relationship between that Act and *Bivens* claims.

not binding authority.")) that the plaintiff inmate was "barred from litigating his *Bivens* claim [for failing to provide adequate medical treatment following his injury] since the cause of his original injury was work-related and compensable only under 18 U.S.C. § 4126," 155 F. Appx at 396, we relied on *Demko* and *Gomez* for this conclusion. As discussed above, however, *Demko* and *Gomez* concerned only the exclusivity of the Inmate Accident Compensation Act in connection with tort claims against the government itself; they did not address constitutional claims against individual defendants. As a result, *Alvarez* is not persuasive authority.

The only circuit to have expressly analyzed the exclusivity of the Inmate Accident Compensation Act as it relates to *Bivens* claims, following the guidance of *Carlson*, *Bush*, and *Schweiker*, concluded that the Inmate Accident Compensation Act does *not* preclude a prisoner from bringing a *Bivens* claim. *Bagola v. Kindt*, 131 F.3d 632, 637-45 (7th Cir. 1994).[13] In *Bagola*, the plaintiff prisoner was injured while working at the federal prison, and alleged that prison officials were deliberately indifferent to his safety in violation of his Eighth Amendment rights. *Id.* at 633-34. The Seventh Circuit noted that the plaintiff prisoner was entitled to compensation under the Inmate Accident Compensation Act for lost-time wages, and that he could also apply for com-

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[13] Additionally, but without in-depth analysis, the Ninth Circuit adopted the conclusion of the Seventh Circuit in *Bagola*. *Vaccaro v. Dobre*, 81 F.3d 854, 857 (9th Cir. 1996). The Ninth Circuit noted that "the theories as well as the defendants in [Inmate Accident Compensation Act] claims and in *Bivens* actions are different" and concluded that the Inmate Accident Compensation Act does not preclude a *Bivens* action against prison officials. *Id.*

pensation for his injury within forty-five days of his release from prison. *Id.* at 634.

The Seventh Circuit then analyzed whether the *Bivens* remedy was also available to the plaintiff prisoner despite the availability of compensation under the Inmate Accident "Compensation Act." Following the *Carlson* "dictates," the Seventh Circuit noted that: (1) the Inmate Accident Compensation Act "contains no explicit congressional statement that a *Bivens* remedy should not be available to federal prisoners compensated under the statutory scheme;" and (2) "the deterrence factor, implicated by both [the imposition of] individual liability and the availability of punitive damages, and the availability of a jury trial weigh even more heavily in favor of allowing a *Bivens* claim" because if the Inmate Accident Compensation Act were an exclusive remedy as against *Bivens* claims, it "would not only insulate individual offenders from liability, but it would also effectively insulate their conduct from review in any trial-like forum." *Id.* at 639.

The Seventh Circuit then went on to analyze, under *Carlson*, *Bush*, and *Schweiker* whether any "special factors counsel hesitation in the absence of affirmative action by Congress." *Id.* at 639 (brackets and internal quotations omitted). The Seventh Circuit recognized that the plaintiff prisoner's "alleged constitutional injury [was] intertwined with his injury covered by the statutory benefits scheme," *id.* at 642, but concluded:

> Nonetheless, we believe that significant procedural distinctions exist between the remedies provided by § 4126 and the statutory remedies that have been found to preclude *Bivens* claims. These distinctions

> indicate that Congress does not consider § 4126 an adequate remedial mechanism to address Eighth Amendment violations, just as surely as it does not consider the FTCA an adequate mechanism to remedy non-work-related prisoner claims. Our analysis is guided by the deterrence factor identified in *Carlson*, as well as the recognized necessity to provide some forum for a prisoner's constitutional claims.
>
> In both *Bush* and *Chilicky*, it is significant that although the plaintiffs were denied a constitutional remedy, the statutory alternative provided a forum where the allegedly unconstitutional conduct would come to light.

Id. at 642-43 (internal citation omitted). The Seventh Circuit then held that § 4126 did not preclude a *Bivens* claim: the statutory scheme lacked requisite procedural safeguards for the prisoner's constitutional rights, the statute possessed very little deterrent value, and there was no explicit indication from Congress limiting the *Bivens* action by the Inmate Accident Compensation Act. *Id.* at 644-45.

We agree with the reasoning of the Seventh Circuit and adopt it as our own. In our view, the Inmate Accident Compensation Act does not preclude us from recognizing Smith's *Bivens* claim, for all the reasons stated by the court in *Bagola*. Unlike *Demko*, where the Inmate Accident Compensation Act was found to preclude an action under the FTCA, the Inmate Accident Compensation Act should not preclude a *Bivens* claim because a claim under the Inmate Accident Compensation Act would be a far different, less inclusive system of recovery than the *Bivens* action. Like *Carlson*, where the

FTCA was not found to preclude an action under *Bivens*, our consideration of the factors relevant here also leads to the conclusion that the *Bivens* remedy is more effective than the Inmate Accident Compensation Act remedy. The Inmate Accident Compensation Act does not explicitly foreclose the *Bivens* remedy, there is very little deterrent effect for constitutional harms within the Inmate Accident Compensation Act, and there is no alternative forum where the alleged constitutional violation could be addressed. We conclude that a *Bivens* action for constitutional harms arising from work-related asbestos exposure is not foreclosed by the compensatory remedy available under the Inmate Accident Compensation Act.

This does not, however, end our inquiry. The district court also dismissed Smith's *Bivens* claim on Rule 12(b)(6) grounds. Under Rule 12(b)(6), this court looks "to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Pace v. Swerdlow*, 519 F.3d 1067, 1073 (10th Cir. 2008) (internal quotations omitted). As stated above, *Twombly* asks us to determine whether Smith's allegations are "plausible." 127 S. Ct. at 1974. In *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008), we stated:

> As best we understand it, however, the [*Twombly*] opinion seeks to find a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.

> The most difficult question in interpreting *Twombly* is what the Court means by "plausibility." . . . "[P]lausible" cannot mean "likely to be true." Rather, "plausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible. The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.

(internal citations and quotations omitted); *see also Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) ("This is not to say that the factual allegations must themselves be plausible; after all, they are assumed to be true. It is just to say that relief must follow from the facts alleged.").

"[T]he degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context. . . . " *Robbins*, 519 F.3d at 1248; *see also Bryson*, 534 F.3d at 1286 (discussing required factual detail). But while "the plaintiff must provide 'more than labels and conclusions, or a formulaic recitation of the elements of a cause of action,'" *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1965) (internal alteration omitted), "'specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests,'" *id.* (quoting *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)) (internal alterations omitted). "Technical fact pleading is not required, but the complaint

must still provide enough factual allegations for a court to infer potential victory." *Bryson*, 534 F.3d at 1286.

We therefore now turn to the merits of Smith's Eighth Amendment claim. In *Robbins*, addressing the sufficiency of the allegations in a complaint against multiple defendants, we stated that "complaints in § 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." 519 F.3d at 1249. We continued:

> We reiterate that context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case. In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual capacities. Therefore it is particularly important in such circumstances that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.

Id. at 1249-50 (internal quotation and citations omitted). These same generalities can be stated of complaints in *Bivens* cases.

To state an Eighth Amendment *Bivens* claim, Smith had to allege that each defendant official[14] acted with

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[14] As noted above, a *Bivens* claim can be maintained only against federal officials in their individual capacities. Those defendants meeting this standard are: the Attorney General of the United States, H. Lappin (the director of the Federal Bureau of Prisons), Eddie Gallegos (the former warden at Leavenworth), William Howell, Jr. (the safety department manager at Leavenworth), John Parent (the Custodial Main-

deliberate indifference—that he or she both knew of and disregarded an excessive risk to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

Although there is certainly no guarantee of ultimate success on the merits, we conclude that, for some of the federal officials named in their individual capacities, Smith has alleged sufficient facts to move his case beyond defendants' Rule 12(b)(6) dismissal motion. Smith alleges that the 1994 Ramsey-Schilling survey documented the presence of asbestos in the storage closet where he was exposed to asbestos. Smith specifically alleges that because of the 1994 Ramsey-Schilling survey, all individual defendants at Leavenworth knew that asbestos was present in the closet. Aplt. App. Doc. 1, Claims for Relief ¶ 1. Although this allegation is not technically specific, it certainly implies that defendants Eddie Gallegos (the former warden at Leavenworth) and William Howell, Jr. (the safety department manager at Leavenworth), both apparently upper-level administrators at Leavenworth, knew about the asbestos in the education department closet. Smith does not, however, make any individual allegations against the Attorney General of the United States or H. Lappin (the director

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tenance Services manager at Leavenworth), Teresa Hartfield (the education administrator at Leavenworth), Jeffery Sinclair (the electrical shop supervisor at Leavenworth), John Doe (a member of the education staff at Leavenworth), Janet Durbin (a former member of the education staff at Leavenworth), and Stephanie Wheeler (a safety department member at Leavenworth).

of the Federal Bureau of Prisons) regarding their knowledge of the 1994 Ramsey-Schilling survey.

Smith also alleges that defendant Stephanie Wheeler, a member of the safety department, had previously directed Gonzalez's activities with respect to removal of the asbestos material, *id.* Attach. IV ¶¶ 34-35, and that defendant Teresa Hartfield had to approve of all work done in the education department, *id.* Statement of Claim ¶ 4, which implies that Hartfield had to have known of the prior asbestos-related work. Smith alleges that John Parent told him he had previously informed the education department staff about the presence of asbestos in the closet, *id.* Attach IV ¶ 33, which would have included defendants Hartfield, Durbin, and John Doe. And, Smith alleges that defendant Durbin was aware of the damaged pipe insulation at the time of Smith's exposure. *Id.* Attach. IV ¶¶ 5-10. Moreover, defendant Jeffery Sinclair is alleged to have given Smith a work pass on the second day so that he could return to the closet and finish the job that could not be finished the first day because of the dust exposure, *id.* Attach. IV ¶ 10, which implies Sinclair's knowledge.

As the litigation progresses, it is possible the government will produce evidence showing that some or all of the individual defendants did not know that the 1994 Ramsey-Schilling survey disclosed the presence of asbestos in the closet, or more generally, that an individual defendant did not know of the presence of asbestos in the closet, based on simple lack of knowledge or intervening circumstances. However, these are matters to be determined at a later point in this case. Smith has satisfied the standard enunciated in *Robbins*—the defendants are on fair notice of who is alleged to have done

what to whom, *Robbins*, 519 F.3d at 1249—as to all defendants named in their individual capacities other than Alberto Gonzales and H. Lappin (the director of the Federal Bureau of Prisons).

As Smith's allegations are legally sufficient to state a claim for relief, the district court erred in granting defendants Eddie Gallegos (the former warden at Leavenworth), William Howell, Jr. (the safety department manager at Leavenworth), John Parent (the Custodial Maintenance Services manager at Leavenworth), Teresa Hartfield (the education administrator at Leavenworth), Jeffery Sinclair (the electrical shop supervisor at Leavenworth), John Doe (a member of the education staff at Leavenworth), Janet Durbin (a former member of the education staff at Leavenworth), and Stephanie Wheeler's (a safety department member at Leavenworth) Rule 12(b)(6) motion.

III

We AFFIRM the district court's dismissal of Smith's FTCA claim against all defendants. We AFFIRM the district court's dismissal of Smith's *Bivens* claim against the United States, federal officials in their official capacities, and federal agency defendants. We also AFFIRM the district court's dismissal of Smith's *Bivens* claim against Alberto Gonzales and H. Lappin. We REVERSE the district court's dismissal of Smith's *Bivens* claim against all individual defendants who are sued in their individual capacities other than Alberto Gonzales and H. Lappin, and REMAND for further proceedings on that claim. We GRANT Smith's "Request to Call for Affidavit," in which he requests that we review certain documents he had filed in the district court proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 07-3242 & 08-3109
(D.C. No. 06-CV-3061-JTM)

BYRON SMITH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; ERIC HOLDER, UNITED STATES ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY; ALBERTO GONZALES, FORMER UNITED STATES ATTORNEY GENERAL, IN HIS INDIVIDUAL CAPACITY; FEDERAL BUREAU OF PRISONS; UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS; AND H. LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS; EDDIE GALLEGOS, ACTING WARDEN; WILLIAM E. HOWELL, JR., SAFETY MANAGER, FEDERAL BUREAU OF PRISONS; JOHN PARENT, CUSTODIAL MAINTENANCE SERVICES MANAGER, FEDERAL BUREAU OF PRISONS; TERESA HARTFIELD, EDUCATION ADMINISTRATOR/ PRINCIPLE, FEDERAL BUREAU OF PRISONS; JEFFERY SINCLAIR, ELECTRIC SHOP SUPERVISOR, FEDERAL BUREAU OF PRISONS; JOHN DOE, EDUCATION STAFF MEMBER, FEDERAL BUREAU OF PRISONS; JANET DURBIN, EDUCATION STAFF MEMBER, FEDERAL BUREAU OF PRISONS; STEPHANIE WHEELER, SAFETY OFFICER, FEDERAL BUREAU OF PRISONS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, DEFENDANTS-APPELLEES

[Filed: Mar. 31, 2009]

JUDGMENT

Before: BRISCOE, HOLLOWAY, and MURPHY, Circuit Judges.

This case originated in the District of Kansas and was argued by counsel.

The judgment of that court is affirmed in part and reversed in part. The case is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ ELISABETH A. SCHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 06-3061-JTM

BYRON SMITH, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: Apr. 10, 2008]

MEMORANDUM AND ORDER

This matter is before the court on plaintiff Byron Smith's motion to alter or amend judgment (Dkt. No. 76) and to supplement plaintiff's traverse (Dkt. No. 79). For the reasons stated below, the court denies the motions.

1. Procedural History

Mr. Smith, a pro se federal prisoner, initially brought a complaint against various officials, primarily alleging that (1) defendants negligently permitted him to work in an area where there was a known presence of asbestos, but failed or refused to post warning signs to notify persons of the presence of asbestos; (2) defendants violated his Eighth Amendment rights and were deliberately indifferent to his safety by exposing him to a large dosage

of asbestos when he was on work detail; and (3) defendants negligently or with deliberate indifference destroyed or lost his medical records (Dkt. No. 5). This court later granted the defendants' motion to dismiss (Dkt. No. 59). After judgment was entered (Dkt. No. 60), Mr. Smith filed his notice of appeal to the Tenth Circuit (Dkt. No. 61), before filing the motion for reconsideration, (Dkt. No. 66), which was denied by this court (Dkt. No. 75). Subsequent to the denial of his motion to reconsider, Smith filed the motion to alter or amend judgment that is currently before the court.

2. Legal Standard

The court may exercise broad discretion to grant relief under Rule 59(e) to alter or amend a prior judgment. *See Comm. for the First Amend. v. Campbell*, 962 F .2d 1517, 1523 (10th Cir. 1992). "Grounds warranting a motion [to alter and amend under Rule 59(e)] include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). In short, the court should only grant a Rule 59(e) motion to correct manifest errors of law, or to present newly discovered evidence. *See Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, 1186 n.5 (10th Cir. 2000).

3. Analysis

Smith requests that pursuant to Rule 59(e), this court reconsider its denial of his previously denied Rule 60(b) motion because he is dissatisfied with the Court's legal and factual findings, and because he believes the court should not have limited his relief to Rule 60(b)(6). The defendants counter that Smith's current motion should be denied because the court did not err and there is no new, material evidence for the court to consider.

After careful review of the record, the court finds that relief under Rule 59(e) is not appropriate in this case, both because Smith's allegedly "new" evidence is not material, and because the court properly construed the Rule 60(b) motion as one for relief under Rule 60(b)(6). Specifically, due to Smith's failure to specify which section of Rule 60(b) he was relying upon, it was within the court's discretion to construe Smith's motion as one for relief under Rule 60(b)(6). *See LaFleur v. Teen Help,* 342 F.3d 1145, 1153 (10th Cir. 2003). Nonetheless, even if the court had considered any of the other subsections of Rule 60(b) when evaluating Smith's request, his motion still would have been denied according to those legal standards, as Rule 60(b) is "an extraordinary procedure permitting the court that entered judgement to grant relief therefrom upon a showing of good cause within the rule." *Cessna Fin. Corp. v. Bielenberg Masonry Contracting Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983). As such, Smith's request for relief pursuant to Rule 59(e) is denied.

Further, Smith's request to supplement his motion to alter or amend judgment (Dkt. No. 79) is denied because the exhibits do not constitute material, newly discovered

evidence. At issue are Smith's exhibits, which are Defendant Bureau of Prisons (BOP) purchase orders Smith recently received pursuant to the Freedom of Information Act (FOIA) and Smith's previously produced medical records. Even if the court were to consider the merits of the exhibits, however, the outcome would not change as the exhibits and affidavit are immaterial to the outcome of the Rule 59(e) motion. As such, Smith's request to supplement his traverse is denied.

IT IS ACCORDINGLY ORDERED this 10th day of April, 2008, that plaintiff's motion to alter or amend judgment (Dkt. No. 76) and plaintiffs motion to supplement plaintiff's traverse (Dkt. No. 79) are denied.

/s/ J. THOMAS MARTEN
J. THOMAS MARTEN, Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 06-3061-JTM

BYRON SMITH, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Dec. 27, 2007

MEMORANDUM AND ORDER

This matter is before the court on plaintiff Byron Smith's motion for reconsideration pursuant to Fed. R. Civ. P. 60(b) (Dkt. No. 66). For the reasons stated below, the court denies the motion.

A. Procedural History

Mr. Smith, a pro se federal prisoner, initially brought a complaint against various officials, primarily alleging that (1) defendants negligently permitted him to work in an area where there was a known presence of asbestos, but failed or refused to post warning signs to notify persons of the presence of asbestos; (2) defendants violated his Eighth Amendment rights and were deliberately indifferent to his safety by exposing him to a large dosage of asbestos when he was on work detail; and (3) de-

fendants negligently or with deliberate indifference destroyed or lost his medical records (Dkt. No. 5). This court later granted the defendants' motion to dismiss (Dkt. No. 59). After judgment was entered (Dkt. No. 60), Mr. Smith filed his notice of appeal to the Tenth Circuit (Dkt. No. 61), before filing the motion presently before the court (Dkt. No. 66).

B. Jurisdiction

Before reaching the merits of Mr. Smith's claim, it is necessary to establish whether this court has jurisdiction. Generally, a notice of appeal divests the district court of jurisdiction. *Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998). Nevertheless, "a notice of appeal does not divest a district court of jurisdiction to consider a Rule 60(b) motion, although it prevents a district court from granting such a motion unless it notifies [the circuit court] of its intention to grant the motion upon proper remand." *West v. Ortiz*, No. 06-1192, 2007 WL 706924, at *5 (10th Cir. March 9, 2007) (citing *Allison v. Bank One-Denver*, 289 F.3d 1223, 1243 (10th Cir. 2002)). Accordingly, this court has jurisdiction to consider and deny the Rule 60(b) motion. If this court determines that the motion has merit, then it must notify the Tenth Circuit and request a remand before granting the motion.

C. Merits of Mr. Smith's Request

Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly

> discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . or (6) any other reason justifying relief from the operation of the judgment.

FED. R. CIV. P. 60(b). Relief under the rule is "an extraordinary procedure permitting the court that entered judgement to grant relief therefrom upon a showing of good cause within the rule." *Cessna Fin. Corp. v. Bielenberg Masonry Contracting Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983). Further, Rule 60(b) is "not available to allow a party merely to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument." *FDIC ex rel. Heritage Bank & Trust v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (quoting *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996)). A Rule 60(b) motion "is not intended to be a substitute for a direct appeal." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000).

Mr. Smith's motion does not specify which section of Rule 60(b) he is relying on for relief. After review of his motion, this court construes it as 60(b)(6), the catch-all provision, which allows for relief only in extraordinary circumstances. *See LaFleur v. Teen Help*, 342 F.3d 1145, 1153 (10th Cir. 2003); *Loum v. Houston's Rests., Inc.*, 177 F.R.D. 670, 672 (D. Kan. 1998). Courts reserve Rule 60(b)(6) relief for situations in which it offends justice to deny relief. *Love v. Roberts*,

No. 05-3481, 2007 WL 3353706, at *1 (D. Kan. Nov. 7, 2007). Mr. Smith fails to cite any "exceptional circumstances" justifying relief, and mere dissatisfaction with this court's ruling does not rise to the level needed to obtain relief under Rule 60(b)(6). As such, Mr. Smith's motion is denied.

IT IS ACCORDINGLY ORDERED this 27th day of December, 2007, that plaintiff's motion for reconsideration (Dkt. No. 66) is hereby denied. Defendant's motion for extension of time to file a response (Dkt. No. 70) is denied as moot.

/s/ J. THOMAS MARTEN
J. THOMAS MARTEN, JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 06-3061-JTM

BYRON SMITH, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: July 26, 2007]

MEMORANDUM AND ORDER

The present matter arises on defendants' motion to dismiss pursuant to the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt. No. 35). For the following reasons, the court grants defendants' motion. Additionally, the court denies plaintiff's motion to strike (Dkt. No. 37); denies plaintiff's motion for default judgment (Dkt. No. 38); denies plaintiff's motions for judicial notice (Dkt. Nos. 54 and 56); and denies plaintiff's motion for reconsideration (Dkt. No. 55).

I. Factual Background:

Plaintiff, Byron Smith, is a prisoner who was incarcerated at the United States Penitentiary at Leavenworth ("USP Leavenworth") during the times relevant

to his First Amended Complaint. Primarily, plaintiff alleges that (1) defendants negligently permitted him to work in an area where there was a known presence of asbestos, but failed or refused to post warning signs to notify persons of the presence of asbestos; (2) defendants violated his Eighth Amendment rights and were deliberately indifferent to his safety by exposing him to very large dosages of asbestos fibers when he was on a work detail; and (3) defendants negligently or with deliberate indifference destroyed or lost his medical records.

For relief, plaintiff seeks $50,000 in compensatory damages, $50,000 in punitive damages, $2,000,000 for negligence, $100,000 for "loss or destruction" of medical records, an unspecified amount for future medical expenses, and regular testing by a professional trained in the area of asbestos.

Plaintiff filed the present action initially on January 6, 2006 in the District of Columbia, which transferred his case to the District of Kansas due to improper venue. Plaintiff thereafter filed a First Amended Complaint in the District of Kansas on March 27, 2006 incorporating by reference the documentation and facts of the original complaint.

Defendant Harley G. Lappin is the Director of the Bureau of Prisons, located in Washington, D.C. At the time of his complaint, petitioner did not state whether he was suing defendant Lappin in his individual or official capacity. Defendant Eddie Gallegos responded to plaintiff's written complaints at the institution and administrative levels. Plaintiff is suing defendant Gallegos in both his individual and official capacities. Defendant Janet Durbin was the former Education Technician at

the USP Leavenworth. Plaintiff is suing defendant Durbin in her individual and official capacities. Plaintiff is suing defendants William Howell, Jr., John Parent, Teresa Hartfield, Jeffrey Sinclair, and Stephanie Wheeler in their individual and official capacities. Plaintiff also is suing the Attorney General, without noting whether he was being sued in his individual and/or official capacity. Finally, plaintiff is filing suit against the USP Leavenworth and the Federal Bureau of Prisons ("BOP").

In 2003, plaintiff was a federal inmate at the USP Leavenworth. In April and June 2003, he worked for the Custodial Maintenance Service as an electrician. While working in this capacity, he received a work order to add a new light fixture in a closet in the Education Building. Defendant Durbin met the plaintiff in the Education Building, unlocked the classroom and the closet, and showed plaintiff where she wanted the light fixture to be placed. Plaintiff and his work crew began working on the light fixture in the closet, which was approximately 12 feet by 6 feet. During the work, inmate C. Gonzales, who worked on a different work order, began pulling pipe out of the closet, which caused the closet to become thick with dust from the pipe insulation. As the dust began to bother plaintiff, he ended his work on the closet until the dust settled. Defendant Durbin also instructed inmate Gonzales to wait until plaintiff and his work crew installed the light fixture before proceeding back into the closet.

On the next day, plaintiff and his work crew returned to the Education Building to work on the fixture. Inmate Gonzales pulled the insulation off the pipe in the closet again, which filled the closet with dust. The dust

bothered plaintiff's eyes and throat, which caused the plaintiff to stop working until the dust settled. Defendant Durbin instructed inmate Gonzales to leave the closet or a report would ensue.

Thereafter, on March 9, 2005, plaintiff completed an Informal Attempt to Resolve form which stated:

> [I]n between the months of April and May I was exposed to very large doses of asbestos while out on a job in the education department. I am requesting to be tested by a specialist in the field for this exposer [sic]. It is of my concern to know why this area was not listed as an unauthorized area to staff and inmates until removed?

Amended Complaint, Dkt. No. 5, at 4, incorporating by reference, Exh. A, at 2, attached to Complaint, Dkt. No. 1. Plaintiff also filed a Request for Administrative Review regarding his alleged asbestos exposure which he described as "very large amounts of 'burst exposures.'" *Id.* at Exh. B, at 3.

In responding to plaintiff's Request for Administrative Review, defendant Gallegos stated that:

> The Education Department inmate orderly was instructed by staff to clean the storage closet. At no time was he instructed to remove any insulation. His removal of the insulation resulted in possible exposure to asbestos. Prior to his entering the closet and disturbing the insulation, the insulation was nonfriable and in good repair. There are no regulations which require the abatement of asbestos containing material which is in good repair.

Id. at Exhibit B, at 5. Defendant Gallegos also noted that: "There were no samples taken of the pipe insulation in the closet where your alleged exposure occurred due to its complete removal before the Safety Department was notified." In addition, "there is no way to determine the amount of possible exposure." *Id.* at Exhibit B, at 4.

On March 16, 2005, plaintiff filed a Request for Administrative Remedy which stated:

> Sir, back in 2003, my medical jacket came up missing from the records department here at Leavenworth Hospital. What I'm requesting to know is: (1) Who released my medical records? (2) To whom where [sic] they released? And Who authorized them to be released without any consent?"

Id. at Exh. B, at 2. Defendant Gallegos responded to plaintiff on April 1, 2005 by stating that: "The review revealed your medical records were lost or destroyed in error and had to be recreated. They were not released to any unauthorized person or agency." *Id.* at Exh. B, at 3.

The present issues for consideration are whether plaintiff has subject matter jurisdiction over any of the defendants under the Federal Tort Claims Act ("FTCA") and/or *Bivens* when the Inmate Accident Compensation Act ("IACA") is the exclusive remedy for inmate work-related injuries; whether plaintiff can state a *Bivens* claim against defendants Lappin, Gallegos, Howell, Parent, Sinclair, Hartfield, Wheeler, or the Attorney General; and whether plaintiff can state a claim against the United States for the negligent loss or destruction of his medical records?

II. Standard of Review:

For 12(b)(I) claims, district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "A case arises under federal law if its 'well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1232 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)).

For purposes of resolving a motion to dismiss with respect to Fed. R. Civ. P. Rule 12(b)(6), the court must accept as true all well-pleaded facts and view those facts in the light most favorable to plaintiff. *See Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.*, 175 F.3d 848, 855 (10th Cir.1999). The court may not grant relief "'unless it appears beyond doubt that the plaintiff can prove no set off acts in support of his claim which would entitle him to relief.'" *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957)).

III. Conclusions of Law:

A. Subject Matter Jurisdiction:

Plaintiff claims that defendants are jointly and severally liable under the FTCA and *Bivens* for injuries sustained from possible asbestos exposure. Defendants argue that the IACA is plaintiff's exclusive remedy for

inmate work-related injuries and therefore, plaintiff is barred from recovery under the FTCA and/or *Bivens*.

The IACA, a prisoner's workers' compensation statute, allows a federal prisoner to seek relief where a federal prisoner is injured while working. *See* 18 U.S.C. § 4126. Plaintiff's claim for relief under the FTCA and/or *Bivens* fails because the IACA provides the exclusive remedy for "injuries suffered . . . in any work activity in connection with the maintenance or operation of the institution [in which the inmates] are confined." *Alvarez v. Gonzalez*, 155 Fed. Appx. 393, 395-96 (10th Cir. 2005) (citing *United States v. Demko*, 385 U.S. 149, 153 (1966) (accepting § 4126 "as an adequate substitute for a system of recovery by common-law torts"); *United States v. Gomez*, 378 F.2d 938, 939 (10th Cir. 1967) (per curiam) (holding that § 4126 "constitute[s] the exclusive remedy for injuries received by federal prisoners while performing assigned prison tasks")). Therefore, plaintiff is barred from litigating his FTCA and/or *Bivens* claim since the cause of his alleged injuries are work-related and compensable only under 18 U.S.C. § 4126.

B. Failure to State A Claim:

1. FTCA:

Notwithstanding the exclusive remedy available to plaintiff under the IACA, plaintiff's claims also fail under the FTCA and *Bivens* for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

First, with respect to the FTCA, a plaintiff can maintain a cause of action against only the United States. *See Menteer v. Applebee*, 196 Fed. Appx. 624, 626 (10th Cir. 2006). The FTCA provides that the United States

shall be liable to the same extent as a private party, "for injury or loss of property . . . or personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *See* 28 U.S.C. § 1346(b); 28 U.S.C. 2674.

With respect to plaintiff's claim for anxiety and emotional distress, under the FTCA, a person convicted of a felony who is currently incarcerated cannot maintain a cause of action against the United States for mental or emotional injury without a prior showing of physical injury. *See* 28 U.S.C. § 1346(b)(2); 42 U.S.C. § 1997e. In the present case, plaintiff was convicted of a felony. Although plaintiff seeks damages for "anxiety and emotional distress," he is not currently suffering from a physical injury because his complaint seeks compensation for "future physical health, safety and well being" and "future medical expenses" that may develop from the possible exposure. Amended Complaint, at 4. Moreover, although plaintiff cites that asbestos exposure caused "irritation to his eyes, throat, and caused shortness of breath," courts have not held that de minimis injuries, where the plaintiff fails to allege lasting, detrimental side effects, or heightened or prolonged physical pain, constitute a physical injury. *See Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1248 (D. Colo. 2006). Because plaintiff cannot demonstrate a significant physical injury, relief under the FTCA is unwarranted.

Furthermore, relief is unavailable under the FTCA for plaintiff's alleged loss of medical records. Under the FTCA, the court has jurisdiction over plaintiff's claim for monetary damages against the United States for his "loss of property . . . caused by the negligent or

wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *See* 28 U.S.C. § 1346(b)(l). However, the Tenth Circuit has held that inmates do not have a protected property interest in prison property. *See Durand v. Deland,* No. 92-4034, 1992 WL 181989, at *1 (10th Cir. July 30,1992) (holding that "C" notes, or chronological notes were prison property and thus, inmate did not have a property interest). For these reasons, plaintiff's claims under the FTCA fail under Fed. R. Civ. P. 12(b)(6).

2. Bivens:

Plaintiff also includes a *Bivens* claim against the individual defendants in their individual capacities under the Eighth Amendment. He alleges that defendants violated his constitutional rights by allegedly exposing him to asbestos, failing to have the asbestos removed following a 1994 survey, and/or knowingly permitting him to enter the work site where asbestos was present.

Plaintiff must demonstrate under a subjective component that "defendant[s] knew he faced a substantial risk of harm and disregarded that risk, 'by failing to take reasonable measures to abate it'" under the deliberate indifference standard. *See Kikumura v. Osagie,* 461 F.3d 1269, 1293 (10th Cir. 2006) (quoting *Farmer v. Brennan*, 511 U.S. 825, 847 (1994)). Additionally, plaintiff must prove an objective component that the alleged deprivation is "'sufficiently serious' to constitute a deprivation of constitutional dimension." *Kikimura,* 461 F.3d at 1292 (quoting *Self v. Crum,* 439 F.3d 1227, 1230 (10th Cir. 2006)). The harm from the alleged injury must be "sufficiently serious." *Id.*

Plaintiff fails to show that the named individual defendants were aware that there was a substantial risk of asbestos exposure. Specifically, plaintiff informed defendants Wheeler, Howell, Sinclair, and Parent about the possible exposure approximately two years after inmate Gonzales pulled the insulation, causing the alleged exposure. Furthermore, plaintiff does not allege defendants' Durbin, Gallegos, Lappin, and the Attorney General's involvement in the possible exposure. Moreover, defendant Durbin was the only named individual defendant who was present at the time of the alleged exposure. However, plaintiff fails to assert an action or inaction taken by defendant Durbin that would constitute deliberate indifference. Plaintiff's complaint does not demonstrate that defendants were aware of the exposure, which fails to meet the required components for "deliberate indifference."

Finally, the court notes that even if plaintiff could maintain his *Bivens* claim against the individual defendants, plaintiff cannot sustain an action against defendant Lappin, the Director of the Bureau of Prisons who resides in Washington, D.C., due to a lack of personal jurisdiction. Personal jurisdiction is determined by the long-arm statute of the sate [*sic*] wherein a suit is brought. Second, the plaintiff must establish that sufficient minimum contacts exist to conform with Due Process requirements. *See Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1357 (10th Cir. 1990).

Plaintiff fails to meet the requirements to establish personal jurisdiction. Plaintiff's allegations with respect to defendant Lappin stem from the fact that he is the Director of the Bureau of Prisons. However, plaintiff's complaint is silent with respect to defendant Lappin's

personal involvement with the alleged Eighth Amendment violation. Therefore, the court finds that plaintiff fails to meet the jurisdictional requirements. For these reasons, the court grants defendants' motion to dismiss.

IT IS ACCORDINGLY ORDERED this 25th day of July, 2007, that defendants' motion to dismiss (Dkt. No. 35) is granted; plaintiff's motion to strike untimely and default (Dkt. No. 37) is denied; plaintiff's motion for default judgment (Dkt. No. 38) is denied; plaintiff's motions for judicial notice (Dkt. Nos. 54 and 56) are denied; and plaintiff's motion for reconsideration (Dkt. No. 55) is denied.

/s/ J. THOMAS MARTEN
J. THOMAS MARTEN, Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 06-3061-JTM

BYRON SMITH, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

July 26, 2007

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED in accordance with the Memorandum and Order filed July 26, 2007, that the defendants' motion to dismiss (Dkt. No. 35) is granted.

INGRID A. CAMPBELL, Acting Clerk

July 26, 2007
Date

By /s/ R. Thompson
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 07-3242

BYRON SMITH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLEES

[Filed: June 8, 2009]

ORDER

Before: BRISCOE, HOLLOWAY and MURPHY, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

Supreme Court, U.S.
FILED
DEC 17 2009
OFFICE OF THE CLERK

No. 09-549

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BYRON SMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

SETH P. WAXMAN
JONATHAN E. NUECHTERLEIN
DANIEL S. VOLCHOK
Counsel of Record
JUDITH E. COLEMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

QUESTION PRESENTED

In *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court held that an individual can normally maintain an Eighth Amendment claim for damages—under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—against federal officials who inflict cruel and unusual punishment on him. The question presented here is whether such a claim is foreclosed in cases covered by the Inmate Accident Compensation Act, 18 U.S.C. § 4126.

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IN THE

Supreme Court of the United States

No. 09-549

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BYRON SMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

Petitioners' statement is correct in its essentials, but it does not adequately describe respondent Byron Smith's allegations in this case. Mr. Smith charges that he was repeatedly exposed to asbestos—and injured as a result—because of petitioners' deliberate indifference to a substantial risk of serious harm to him. *See* Second Am. Compl. (Dkt. No. 110), at 12-14 (Sept. 28, 2009); *see also Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994) (describing this as the relevant standard for Eighth Amendment liability).[1] More specifically, Mr. Smith

[1] All docket numbers cited herein pertain to case number 5:06-cv-3061-JTM-DWB (D. Kan.).

alleges that each individual petitioner knew that there was friable asbestos in a particular closet in the prison where he was housed, and that petitioners nonetheless sent him to perform work in the closet without first removing the asbestos, providing him with protective gear, or taking any other steps to address the serious health threat that the asbestos posed (and even without informing him of the threat). *See* Second Am. Compl. 14. During the administrative proceedings, the prison warden, petitioner Eddie Gallegos, acknowledged that a survey of the prison performed almost a decade before Mr. Smith's exposures documented the presence of the friable asbestos. *See id.* Ex. 10 (warden's statement); Opp. to Mot. To Dismiss (Dkt. No. 40), Ex. 2 (Feb. 1, 2007) (survey excerpts).

Mr. Smith states in the operative complaint that since his exposures he has experienced numerous ailments, including "recurring shortness of breath, chronic obstructive pulmonary disease, various lung infections, wheezing, bronchitis, ... [and] asthma, and [he] has recently been diagnosed with left lower lung linear atelectasis." Second Am. Compl. 12. Mr. Smith "did not suffer with any of these ... conditions prior to being exposed to asbestos." *Id.*

REASONS FOR DENYING THE PETITION

The court of appeals faithfully followed this Court's precedent in deciding this case. Petitioners do not contend that the Tenth Circuit's holding conflicts with a published decision from another circuit—it does not—and in fact petitioners do not argue that plenary review by this Court is warranted for any reason. They do assert that the Tenth Circuit's ruling is inconsistent with several of this Court's cases, but that assertion is meritless. Petitioners aiso ask that their petition be

held pending this Court's decision in *Hui* v. *Castaneda*, No. 08-1529 (cert. granted Sept. 30, 2009), but that request should be rejected because it is highly improbable that the decision in *Hui*, which revolves around an express preclusion clause unlike anything applicable here, will affect this case. The petition should be denied promptly.

1. The court of appeals correctly concluded that under this Court's case law, the Inmate Accident Compensation Act (IACA), 18 U.S.C. § 4126, does not foreclose respondent Byron Smith's Eighth Amendment claim against the individual petitioners. Adopting the extended analysis offered by the Seventh Circuit in *Bagola* v. *Kindt*, 131 F.3d 632 (7th Cir. 1997), the Tenth Circuit first observed that in *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court held that an individual can normally pursue an Eighth Amendment claim, under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 488 (1971), against federal officials who inflict cruel and unusual punishment on him, *see* Pet. App. 16a (citing *Carlson*, 446 U.S. at 18). The Tenth Circuit recognized that this Court had earlier held, in *United States* v. *Demko*, 385 U.S. 149 (1966), that when the IACA applies it bars claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.* *See* Pet. App. 17a-18a (citing *Demko*). But the court of appeals correctly noted that *Demko* was not dispositive here because it addressed only the preclusion of FTCA claims (i.e., common-law tort claims), which serve a different purpose than *Bivens* claims (i.e., constitutional tort claims). *See id.*; *see also Bagola*, 131 F.3d at 642 & n.15; *Vaccaro* v. *Dobre*, 81 F.3d 854, 857 (9th Cir. 1996) ("*Demko* establishes that 18 U.S.C. § 4126 is the exclusive remedy 'against the Government.' [A] *Bivens* action is not against the government.

... Also, the theories as well as the defendants in section 4126 claims and in *Bivens* actions are different." (quoting *Demko*, 385 U.S. at 150)).

The court of appeals similarly took proper account of this Court's *Bivens* decisions since *Carlson*. The Tenth Circuit discussed every one of the cases with which petitioners contend its holding is inconsistent, including *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); and *Wilkie* v. *Robbins*, 551 U.S. 537 (2007). *See* Pet. App. 19a-20a & n.11; *see also Bagola*, 131 F.3d at 638, 640-641, 643-644 (discussing *Bush* and *Schweiker*). Indeed, the court quoted at length from *Bush* and *Schweiker* regarding when a *Bivens* remedy is precluded. *See* Pet. App. 19a-20a. The court then correctly explained why here those cases do not warrant a departure from this Court's approval in *Carlson* of an Eighth-Amendment-based *Bivens* remedy.

Specifically, the court explained (as the Seventh Circuit had in *Bagola*) that unlike in the cases in which this Court declined to permit *Bivens* claims, the alternative remedy here does little or nothing to deter unconstitutional conduct by federal officials: It offers no damages remedy, *see Carlson*, 446 U.S. at 21 ("It is almost axiomatic that the threat of damages has a deterrent effect[.]"), and it provides no forum in which unconstitutional conduct can be brought to light, thereby deterring such conduct. *See* Pet. App. 23a, 24a; *accord Bagola*, 131 F.3d at 644. Because this Court has "emphasized that 'the purpose of *Bivens* is to deter the officer,'" *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69 (2001) (emphasis omitted) (quoting *Federal Deposit Ins. Corp.* v. *Meyer*, 510 U.S. 471, 485 (1994)), the court of appeals concluded that the lack of any deterrent effect renders the IACA an inadequate substitute

for a *Bivens* action. *See Wilkie*, 551 U.S. at 550 (courts addressing preclusion of a *Bivens* remedy first consider "whether any alternative, existing process for protecting the interest" is adequate to bar such a remedy).[2]

The court of appeals also embraced the Seventh Circuit's conclusion, *see Bagola*, 131 F.3d at 642-645, that no "special factors" foreclose a *Bivens* remedy in cases like this, *see Wilkie*, 551 U.S. at 550 (if no adequate alternative process exists, courts next consider whether any "'special factors counsel[] hesitation'" before recognizing a *Bivens* remedy (quoting *Bush*, 462 U.S. at 378)). That conclusion was likewise correct and consistent with this Court's case law, for two related reasons. *First*, this case does not involve any of the contexts that, under this Court's jurisprudence, sufficiently "counsel[] hesitation" as to foreclose a *Bivens* remedy, including: the military (*e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296 (1983)), government employment

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[2] Perhaps seeking to dispute the IACA's failure to provide a forum that can deter constitutional violations, petitioners note (Pet. 5) that IACA claimants can request a hearing on their claims. To begin with, however, the law's implementing regulations severely restrict claimants' ability to present (or challenge) evidence at such hearings. *See, e.g.*, 28 C.F.R. §§ 301.309(f), 301.310. More fundamentally, as the Seventh Circuit observed, "because § 4126 is a *no fault* compensation scheme, the conduct that caused the work-related injury is not relevant and likely will not be exposed by the claim evaluation process," including at any hearing. *Bagola*, 131 F.3d at 644. And because an IACA claim based on physical impairment cannot be made until shortly before an inmate's release, *see* Pet. 5 (citing 28 C.F.R. § 301.303(a)), any such hearing might not even occur until years after the injury, "when evidence likely will have been lost, offenders may no longer be federal employees, and other prisoners may have been subsequently subjected to similar unconstitutional abuses," *Bagola*, 131 F.3d at 644.

(*Bush*), federal fiscal policy (*United States* v. *Standard Oil Co. of California*, 332 U.S. 301 (1947)), and non-governmental or agency defendants (*Malesko*, *FDIC* v. *Meyer*). This case instead involves the same context that the Court in *Carlson* held does *not* involve any special factors precluding a *Bivens* remedy, namely the allegedly unconstitutional mistreatment of inmates by federal officials. *See* 446 U.S. at 19.

Second, the only special factor that petitioners pointed to in their briefing below was the possibility that permitting claims like Mr. Smith's "may deter [prison] employees from running work programs." Appellees' CA Supp. Br. 37. But as this Court has noted (in a case post-dating *Bush* and *Schweiker*), "[i]n *Carlson*, the Court held that 'special factors' do not free prison officials from *Bivens* liability, because prison officials ... are [not] likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim." *McCarthy* v. *Madigan*, 503 U.S. 140, 151 (1992) (citing *Carlson*, 446 U.S. at 19). Petitioners offered nothing below (and offer nothing in the petition) that would support a different conclusion in cases covered by the IACA. In particular, they offer nothing indicating that prison officials in the Seventh and Ninth Circuits have been deterred from running work programs, even though for more than ten years it has been the law in both circuits that the IACA does not bar *Bivens* claims, *see Bagola*, 131 F.3d 632; *Vaccaro*, 81 F.3d 854.

In sum, the decision below was faithful to all of this Court's case law. It was also consistent with the IACA's implementing regulations, which provide that the statute precludes only common-law tort claims. *See* 28 C.F.R. § 301.319 ("Inmates who are subject to the provisions of these Inmate Accident Compensation regulations are barred from recovery under the

Federal Tort Claims Act, 28 U.S.C. [§§] 2671 *et seq.*"). Deference to the statutory interpretation reflected in these regulations supports the Tenth Circuit's view that Mr. Smith's Eighth Amendment claim is not foreclosed. *Cf. Howe* v. *Smith*, 452 U.S. 473, 485 (1981) ("Because the Attorney General, and through him the Bureau of Prisons, are charged with the administration of [18 U.S.C.] § 5003, their view of the meaning of the statute is entitled to considerable deference."). *See generally Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984).

Finally, the Tenth Circuit's ruling is almost certainly in line with Congress's intent regarding the IACA's preclusive effect—which is of course what ultimately controls. It has been over a decade since the Seventh and Ninth Circuits reached the same conclusion about the IACA's impact on *Bivens* actions that the court of appeals did here. *See Bagola*, 131 F.3d 632; *Vaccaro*, 81 F.3d 854. Yet Congress has not acted to overturn those courts' rulings. As this Court has explained, such congressional inaction in the wake of a judicial construction of a statute strongly suggests that the construction is correct. *See Shepard* v. *United States*, 544 U.S. 13, 23 (2005) ("[T]ime has enhanced even the usual precedential force [applicable in cases of statutory interpretation], nearly 15 years having passed since *Taylor* [v. *United States*, 495 U.S. 575 (1990),] came down, without any action by Congress to modify the statute."); *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) ("Nor has Congress changed this standard in the close to 40 years since it was articulated [by the Court], even though ... Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." (quoting *Feres* v. *United States*, 340 U.S. 135, 138 (1950))).

That *Bagola* and *Vaccaro* were decided by courts of appeals rather than this Court does not alter this conclusion, because Congress sometimes reacts to the decision of even a single court of appeals. *See, e.g.*, *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 282 n.19 (1977) ("Acting to reverse a Circuit Court of Appeals decision, Congress authorized issuance of licenses for the 'coasting trade and mackerel fishery.'" (citation omitted)); *Owner-Operator Indep. Drivers Ass'n* v. *Federal Motor Carrier Safety Admin.* (FMCSA), 494 F.3d 188, 197 (D.C. Cir. 2007) ("After our [prior] decision ... vacated the 2003 Rule, FMCSA sought and received temporary relief from the vacatur in Congress."). Here, there were two published circuit decisions that applied to roughly a score of federal prisons (likely employing hundreds or thousands of potential *Bivens* defendants). *See* List of U.S. Federal Prisons, *at* en.wikipedia.org/wiki/List_of_U.S._federal_prisons (last visited Dec. 17, 2009); Bureau of Prisons: Maps of Facilities, *at* www.bop.gov/locations/locationmap.jsp (last visited Dec. 17, 2009). Under these circumstances, Congress's prolonged inaction is highly instructive, and it confirms the correctness of the decision below.

2. Petitioners nevertheless challenge the Tenth Circuit's IACA holding. Petitioners do not assert, however, that it conflicts with an authoritative decision from any other circuit. To the contrary, they rightly acknowledge that each of the other two circuits to address the question presented in a published opinion—the Seventh and the Ninth—reached the same conclusion that the court of appeals reached here (as did another circuit in an unpublished opinion). *See* Pet. 12 n.6 (citing *Bagola*, *Vaccaro*, and *Cooleen* v. *Lamanna*, 248 F. App'x 357, 362 n.5 (3d Cir. 2007)). Petitioners instead contend that the Tenth Circuit's decision and rea-

soning are inconsistent with *Demko*, *Bush*, *Schweiker*, and *Wilkie*. That contention is without merit.

To begin with, petitioners concede (Pet. 13) that *Demko* "does not strictly control the outcome of this case" because it involved preclusion of common-law (i.e., FTCA) claims against the United States, rather than constitutional (i.e., *Bivens*) claims against federal officials. In fact, this Court made the limit of its holding in *Demko* quite clear, stating that "[u]ntil Congress decides differently we accept the prison compensation law as an adequate substitute for a system of recovery *by common-law torts*." 385 U.S. at 153 (emphasis added); *see also, e.g., id.* at 151 ("[C]ompensation laws are practically always thought of as substitutes for ... common-law tort actions."). Petitioners argue, however (Pet. 13), that the reasons underlying the Court's decision in *Demko* should have led the court of appeals to conclude that the IACA bars a *Bivens* remedy. But those reasons do not apply equally to preclusion of *Bivens* actions, because FTCA and *Bivens* claims serve different purposes. The purpose of FTCA claims is to ensure compensation for injured plaintiffs. *See, e.g., Johnson*, 481 U.S. at 689-690. By contrast, "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations," *Malesko*, 534 U.S. at 70. Hence, while the fact that Congress "'created a comprehensive system *to award payments for injuries*,'" Pet. 13 (emphasis added) (quoting *Demko*, 385 U.S. at 151), does suggest an intent to bar FTCA claims, which serve the same purpose, it does not suggest an intent to foreclose *Bivens* claims, which serve a very different purpose.

Petitioners next assert (Pet. 13) that the Tenth Circuit "placed undue reliance" on this Court's statement in *Carlson* that Congress can bar a *Bivens* rem-

edy by expressly declaring an alternative remedy to be an equally effective substitute. The court of appeals did no such thing. To be sure, on the pages petitioners cite the court properly recounted this Court's holding in *Carlson*. *See* Pet. App. 18a-19a. But that hardly constitutes "undue reliance" on that holding. And as explained, *see supra* pages 4-5, the Tenth Circuit went on to recount (and apply) this Court's later *Bivens* decisions, including those to which petitioners point. *See* Pet. App. 19a-24a. In doing so, the court noted that the IACA does not explicitly foreclose a *Bivens* action, *see id.* at 23a—and that observation was proper, because an express congressional declaration, while not necessary to preclude a *Bivens* remedy, is certainly one way in which congressional intent to bar *Bivens* actions *can* be revealed. *See Bush*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, ... that the courts' power [to recognize a *Bivens* remedy] should not be exercised."); *see also id.* at 373, 378 (noting the absence in that case of any express preclusion). Nowhere, however, did the court of appeals say or even imply, as petitioners suggest, that it was rejecting petitioners' position solely because such express preclusion was absent. Nor did the court in *Bagola*, which the Tenth Circuit followed here, say or imply anything of the sort. To the contrary, the Seventh Circuit stated that it could not "consider *Carlson*'s dictates alone in deciding whether Bagola can properly state a *Bivens* claim," because "[t]he Supreme Court subsequently has refined this [preclusion] inquiry." 131 F.3d at 639 (citing *Schweiker*, 487 U.S. at 423). And *Bagola* then went on to discuss and apply the cases that made those refinements. Put simply, nothing in the decision below supports petitioners' claim that the court of appeals

"placed undue reliance" (Pet. 13) on the "explicitly declared" and "equally effective" language in *Carlson*.[3]

Petitioners likewise go astray in asserting (Pet. 15) that the Tenth Circuit "stressed that the remedies provided in the IACA do not provide full relief for plaintiffs' alleged constitutional injuries." Petitioners provide no concomitant cite to the Tenth Circuit's opinion in making this charge, and in actuality the court of appeals did not mention this fact, let alone "stress[]" it. The closest the court came was its statement that an IACA claim "would be a far different, less inclusive system of recovery than the *Bivens* action." Pet. App. 23a. But as its use of the word "system" makes clear, the court was referring to the fact that under the IACA, relief is afforded through an administrative rather than a judicial process, one that does not provide the same procedural protections (full discovery, for example), nor permits recovery against those who caused the harm. In any event, here again petitioners' argument suggests that the court of appeals placed dispositive weight on this factor. That is manifestly wrong. At most the court regarded the minimal relief available under the IACA as one factor—which the court properly considered along with many others—that is relevant in ascertaining Congress's intent. *See Schweiker*, 487 U.S. at 425 (pertinent consideration for courts is

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[3] Even were it otherwise, that would not establish a clear conflict between the Tenth Circuit's decision and *Bush* or *Schweiker*, as petitioners suggest: In *McCarthy*, which post-dated *Bush* and *Schweiker*, this Court reiterated and applied *Carlson*'s "equally effective" and "explicitly declared" standard. *See* 503 U.S. at 151 (citing *Carlson*, 446 U.S. at 18-19). *McCarthy*, moreover, unlike any of the Court's other post-*Carlson Bivens* cases, involved the same Eighth Amendment claim at issue here (and in *Carlson*).

whether Congress has "failed to provide meaningful ... remedies"); *accord Bush*, 462 U.S. at 368, 386.

As for *Wilkie*, petitioners never directly explain the supposed inconsistency between that decision and the Tenth Circuit's ruling. In their Statement, however, they assert (Pet. 10) that the court of appeals "rejected petitioners' argument that the court should ... us[e] the analysis ... in *Wilkie*" and "adopted instead the pre-*Wilkie Bagola* court's analysis of 'special factors.'" The premise of this assertion—left implicit here but stated explicitly in petitioners' briefing below—is that *Wilkie* changed the framework for analyzing the preclusion of *Bivens* actions, such that the "pre-*Wilkie Bagola* court's analysis of special factors" is no longer appropriate. That premise is false. *Wilkie* employed the same basic analysis that this Court has used for decades, explaining that a *Bivens* action may be foreclosed when Congress provides adequate alternate remedial mechanisms for constitutional violations or when there are "special factors" suggesting that a *Bivens* remedy is inappropriate. *See Wilkie*, 551 U.S. at 550; *compare Bush*, 462 U.S. at 378; *Carlson*, 446 U.S. at 18-19 & n.5. *Wilkie* introduced the labels "step one" and "step two," but it did not substantively change the doctrinal framework. *Wilkie* itself makes this clear, both by stating that its "consideration of a *Bivens* request follows a familiar sequence," 551 U.S. at 550, and by citing *Bush* in describing both step one and step two, *see id.* *Bagola*'s analysis, and hence that of the Tenth Circuit, was thus fully consistent with *Wilkie*.[4]

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[4] Petitioners also note the Tenth Circuit's statement "that no analysis of whether to recognize a new *Bivens* remedy was necessary because this Court in *Carlson* had already recognized a

In short, there is no merit to petitioners' claim that the Tenth Circuit's decision is inconsistent with any of this Court's holdings or reasoning. The Seventh Circuit's analysis in *Bagola*—repeated in part and adopted in full by the Tenth Circuit here—involved both an extended discussion of this Court's relevant decisions and a careful application of those decisions to the question presented here. Further review is unwarranted.

3. Petitioners themselves appear to recognize this, as they do not ask this Court to undertake plenary review. They instead ask the Court to hold their petition pending the decision in *Hui* v. *Castaneda*, No. 08-1529. According to petitioners (Pet. 15-16), the decision in *Hui* "will likely illuminate the circumstances in which an existing statutory remedy precludes recognition of a *Bivens* remedy when Congress has not explicitly stated its preclusive intent." That is incorrect, and hence a hold is not warranted.

As petitioners state (Pet. 11), *Hui* presents the question whether 42 U.S.C. § 233(a) bars certain *Bivens* claims against members of the Public Health Service (PHS). But of central importance in *Hui* is the fact that § 233(a) expressly provides that an FTCA action for injuries resulting from specified conduct by a PHS offi-

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Bivens remedy for 'an Eighth Amendment violation by prison officials.'" Pet. 10 (quoting Pet. App. 20a n.11). That statement was entirely correct; the Court in *Carlson* did recognize the precise *Bivens* remedy that Mr. Smith seeks to invoke. *See, e.g., Wilkie*, 551 U.S. at 549-550 ("[W]e have recognized [a *Bivens* remedy] ... for an Eighth Amendment violation by prison officials." (citing *Carlson*)). But of course that fact did not relieve the court of appeals of its obligation to analyze whether, under *Carlson* and later decisions, the IACA bars the remedy that this Court has held is normally available. The Tenth Circuit fulfilled that obligation.

cer or employee "shall be exclusive of any other civil action or proceeding" based on the same injuries. The IACA contains no remotely similar clause—or, indeed, any preclusion clause.[5] There is thus no merit to petitioners' vague assertion that "[t]his Court's disposition of [*Hui*] will likely illuminate the circumstances in which an existing statutory remedy precludes recognition of a *Bivens* remedy *when Congress has not explicitly stated its preclusive intent.*" Pet. 15-16 (emphasis added); *accord* Pet. 12. In reality, the Court's decision and reasoning in *Hui* will almost certainly be grounded entirely in the express preclusion clause in § 233(a).

This is confirmed by the fact that the text, purpose, and history of that clause are (not surprisingly) the overwhelming focus of the merits briefs filed in this Court in *Hui* both by the petitioners and by the United States as amicus curiae.[6] In fact, the United States argues in its brief that "[t]he plain language of Section 233(a) resolves this case." U.S. Amicus Br. 7, *Hui* v. *Castaneda*, No. 08-1529 (U.S. Dec. 11, 2009), *available at* 2009 WL 4759119. Even if that argument is correct, it is irrelevant to the Tenth Circuit's decision here, as

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[5] This also distinguishes the IACA from the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq.*, which likewise contains an express preclusion clause, *see id.* § 8116(c); *see also* Pet. 3 (attempting to link the IACA and FECA).

[6] For example, the first (and longest) argument section in one petitioner's brief is entitled "The Plain Language of § 233(a) Bars Respondents' *Bivens* Claims Against Petitioners." Br. for Pet. Gonsalves 23-42, *Hui* v. *Castaneda*, No. 08-1529 (U.S. Dec. 4, 2009), *available at* 2009 WL 4617134; *see also* Br. for Pet. Hui 19-33, *Hui* (Dec. 4, 2009), *available at* 2009 WL 4709537 (similar); U.S. Amicus Br. 9-19, *Hui* (Dec. 11, 2009), *available at* 2009 WL 4759119 (plain-text and legislative-history arguments).

are virtually all of the other arguments that the petitioners and the United States advance in *Hui* for reversal of the Ninth Circuit's ruling. Contrary to petitioners' unelaborated contention here, then, *Hui* is extremely *un*likely to have any application to cases—such as this one—that involve no express preclusion clause. Even if the Court in *Hui* were to speak to cases like this one, moreover, there is no reason to expect that it would do so in a way that departs from prior *Bivens* case law. Again, neither the United States nor the petitioners in *Hui* propose such a departure. And as discussed, the court of appeals here properly considered that prior case law. There is thus no "reasonable probability" that a remand to the Tenth Circuit following the decision in *Hui* would lead to a different result. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). A hold is therefore not warranted.[7]

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[7] The United States itself has argued against a hold in similar circumstances. In its brief in opposition in *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), the United States contended that there was no need to hold the petition for certiorari pending the decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007). The government acknowledged that the two cases presented similar issues "[a]t a general level." U.S. Br. in Opp. 15, *John R. Sand & Gravel Co.* v. *United States*, No. 06-1164 (U.S. Apr. 27, 2007), *available at* 2007 WL 1257289. "But," the United States asserted, "because *Bowles* does not involve a statutory provision governing the time for filing suit against the United States, the Court should have no occasion to address the question presented here[.]" *Id.* The same logic applies here: Both *Hui* and this case involve a similar issue "[a]t a general level," *id.*, namely whether an otherwise-available *Bivens* remedy is precluded by a particular statute. But because *Hui* involves—and indeed revolves around—an express preclusion clause unlike anything in the IACA, the Court's decision in *Hui* will very likely have little or no bearing here.

Furthermore, an unnecessary hold would cause prejudice to Mr. Smith, because proceedings in the district court have effectively been stayed—at petitioners' behest—pending the Court's disposition of the petition. Following the Tenth Circuit's remand, Mr. Smith filed a second amended complaint. *See* Dkt. No. 110. Rather than answer, petitioners moved to stay the proceedings in light of the filing of their petition for certiorari. *See* Defs.' Mot. To Stay Proceedings & Notice of Pet. for Writ of Cert. (Dkt. No. 115) (Nov. 6, 2009). The district court has not acted on the motion, even though it was filed over a month ago, and the deadline for petitioners to answer the complaint likewise passed well more than a month ago. In effect, then, proceedings have been stayed, thereby delaying the time when Mr. Smith may finally receive relief for the constitutional violations he alleges. Given the extreme unlikelihood that the decision in *Hui* will affect this case, the Court should not impose an additional delay of several months on Mr. Smith by holding the petition until it decides *Hui*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
JONATHAN E. NUECHTERLEIN
DANIEL S. VOLCHOK
Counsel of Record
JUDITH E. COLEMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

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No. 09-549

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

BYRON SMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals created a new cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Eighth Amendment deliberate indifference claims by an inmate who is injured during a prison work assignment. It did so notwithstanding the existence of the Inmate Accident Compensation Act (IACA), 18 U.S.C. 4126(c), an administrative remedy that this Court has found provides the "exclusive" remedy for a federal prisoner suffering a work-related injury, see *United States* v. *Demko*, 385 U.S. 149, 152, 154 (1966). Respondent denies both that the court of appeals' decision conflicts with any decision of this Court and that this Court's forthcoming decision in *Hui* v. *Castaneda*, cert. granted, No. 08-1529 (Sept. 30, 2009) (*Castaneda*), may be relevant to the disposition of the issue presented in this case. Because respondent is incorrect on both counts, this Court should hold the

government's petition for a writ of certiorari pending the Court's decision in *Castaneda*, and then dispose of the petition accordingly.

As this Court recently reiterated in *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007), a court's consideration of "whether to recognize a *Bivens* remedy may require two steps": (1) a determination of "whether any alternative, existing process for protecting the interest [at stake] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages"; and (2) consideration of whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Ibid.* (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). The common issue shared by this case and *Castaneda* involves the proper execution of the first step. In both cases, the courts of appeals improperly created a new *Bivens* remedy in spite of Congress's prior creation of a remedial scheme intended to occupy the relevant field.

The first step of the *Wilkie* analysis examines the nature of existing, non-*Bivens* remedies for the injury alleged. In this case, respondent had the right to seek compensation for his claimed injury through the remedial scheme implementing the IACA. That scheme authorizes an inmate injured in the course of a prison work assignment to receive compensation both for wages lost as a result of his injury, 28 C.F.R. 301.101(b), 301 Subpt. B, and for any residual physical impairment that remains when he is released from custody, 28 C.F.R. 301.303(a), 301.314(a). In purpose and design, the IACA operates as a typical workers' compensation system, and this Court has noted that the payments authorized under the IACA for residual injuries "compare[] favorably with compensation laws all over the country," and, in-

deed, "offer[] far more liberal payments than many of the state compensation laws." *Demko*, 385 U.S. at 152-153. Like typical workers' compensation systems, the IACA is intended to be the exclusive remedy for the work-related injuries it covers. As this Court reasoned in *Demko*, "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group." *Id.* at 152. That principle led this Court to conclude that the IACA is in fact the exclusive remedy against the United States for inmates injured on the job. *Id.* at 152-154.

The remedial scheme at issue in *Castaneda* similarly evinces a congressional purpose of exclusivity—in that case, an intent that the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, be the sole remedy for persons injured as a result of medical functions performed by a commissioned officer or employee of the Public Health Service. In 42 U.S.C. 233(a), Congress stated that an action under the FTCA against the United States for such injuries shall be "exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim."

As explained in the petition for a writ of certiorari (Pet. 13-15), both the court of appeals in this case and the Ninth Circuit in *Castaneda* created a new *Bivens* cause of action in reliance on this Court's statement in *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980), that courts should refrain from creating a *Bivens* claim when "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." See Pet. App. 18a-19a; *Castaneda* v. *United States*, 546

F.3d 682, 689 (9th Cir. 2008), petitions for cert. granted, No. 08-1529 and No. 08-1547 (Sept. 30, 2009), petition for cert. dismissed, No. 08-1547 (Oct. 29, 2009).

But in the nearly three decades since this Court decided *Carlson*, this Court has repeatedly clarified that in undertaking the first step of the *Wilkie* analysis, courts should not demand any equivalence between a *Bivens* claim and an alternative statutory remedy (Pet. 14-15). According to the Court's more recent cases, Congress need not explicitly declare that a remedial scheme is intended to supplant a *Bivens* claim. Nor need such a scheme be as effective as a *Bivens* claim in order to preclude the creation of a direct cause of action under the Constitution. *Bush*, 462 U.S. at 380-390; *Schweiker* v. *Chilicky*, 487 U.S. 412, 424-429 (1988); *Wilkie*, 551 U.S. at 551-562.

Respondent downplays the court of appeals' reliance on the statement in *Carlson*, defending its holding primarily by arguing that the purposes of *Bivens* are not served by the IACA (Br. in Opp. 4-5, 9). That is just another way of arguing that the IACA is not as effective as a *Bivens* remedy in curing or compensating for an alleged constitutional injury. *Wilkie* made clear that its analysis is not designed to determine whether an existing remedial scheme accomplishes the same goals as *Bivens*. The first step of that analysis assesses only whether the structure and scope of the existing scheme "amounts to a convincing reason for the Judicial Branch to refrain from" superimposing on it a "new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. In *Wilkie*, the Court surveyed the alternative remedies available to the plaintiff, noting that "the forums of defense and redress open to [the plaintiff] are a patchwork, an assemblage of state and federal, administrative

and judicial benches applying regulations, statutes, and common law rules." *Id.* at 554. In assessing these various alternative remedies, the Court asked not whether they served the same purposes as a *Bivens* remedy, but instead, whether they demonstrated "that Congress expected the Judiciary to stay its *Bivens* hand." *Ibid.* In *Wilkie*, the Court concluded that the patchwork of remedies available did not show that Congress intended to preclude a *Bivens* remedy. In this case, by contrast, the nature of the workers compensation scheme embodied in the IACA provides ample reason to conclude that Congress intended the IACA to be "the exclusive remedy" available for inmates who are injured during a prison work assignment. *Demko*, 385 U.S. at 152.

Respondent argues (Br. in Opp. 9) that this Court's holding in *Demko* that the IACA precludes "recovery by common-law torts" through the FTCA for injuries resulting from prison work assignments, 385 U.S. at 153, is not relevant to the question presented in this case—*i.e.*, whether the IACA precludes recovery directly under the Constitution for such injuries. Respondent reasons (Br. in Opp. 9) that the holding in *Demko* is immaterial "because FTCA and *Bivens* claims serve different purposes." But this Court's exclusivity holding in *Demko* was based on the structure and purposes of the IACA, not on the structure and purposes of the FTCA. See 385 U.S. at 151-153. The exact same focus is required in the first *Wilkie* step. Accordingly, the Court should reach the same conclusion about Congress's intent for the remedial scheme implementing the IACA to

serve as the exclusive remedy for inmates injured during work assignments.

Respondent is also incorrect that this Court's forthcoming decision in *Castaneda* is likely to be "irrelevant" (Br. in Opp. 14) to the issue presented in this case. The court of appeals in *Castaneda* applied the same erroneous analysis used by the court of appeals in this case. That court too asked whether the FTCA provides a remedy that is "equally effective" as a *Bivens* remedy rather than asking whether Congress intended the existing remedial scheme to be exclusive. *Castaneda*, 546 F.3d at 689-691. This Court's review of that analysis will surely shed light on the appropriate disposition of this case.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's decision in *Hui* v. *Castaneda*, No. 08-1529, and then disposed of accordingly.

Respectfully submitted.

ELENA KAGAN
Solicitor General

DECEMBER 2009

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* Moreover, respondent's suggestion (Br. in Opp. 7) that this Court should infer congressional approval of the two previous courts of appeals decisions holding that the IACA does not preclude the creation of a *Bivens* remedy is meritless. In support of his suggestion, respondent cites cases inferring congressional approval of *this Court*'s previous interpretations of statutes from many years of congressional inaction. No such approval may be inferred from Congress's failure to respond to erroneous decisions from two courts of appeals, particularly when those decisions conflict with decisions of this Court.